85-1691

No.____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

SANFORD BERNSTEIN,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, JAMES MCCARTHY, COUNTY OF LEHIGH, WILLIAM PLATT, ANTHONY PADRONE, WULF HEUSINGER, THOMAS MURTAUGH, DONALD LAYTON, DALE YEAGER, MICHAEL ALVIN, JIMMY H. COLEMAN, NANCY H. BERNSTEIN, CATASAQUA POLICE DEPARTMENT, ALLENTOWN POLICE DEPARTMENT, WOODROW KEISER,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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EDITOR'S NOTE

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the principles of *Wilson v. Garcia*, ____U.S. ____, 105 S.Ct. 1938 (1985), which held that an action under 42 U.S.C. §1983 must be characterized as a personal injury action for the purpose of borrowing the appropriate state statute of limitations, should be extended to actions under 42 U.S.C. §§1981 and 1985.

2. Whether the principles set forth in *Wilson v. Garcia*, should be applied retroactively.

3. Whether the Court of Appeals applied an improper standard for a continuing conspiracy, in ruling that for statute of limitations purposes, petitioner's cause of action accrued when he knew, or with reasonable diligence should have known, of the conspiracy.

4. Whether this Court should exercise its power of supervision to review the decisions of the courts below concerning: a) the dismissal of petitioner's claims under 42 U.S.C. §§1981, 1985, and 1986, upon the ground that his cause of action could be maintained under 42 U.S.C. §1983; b) the dismissal of petitioner's claims against Lehigh County and its prosecutor; and c) the failure of the courts below to address or rule upon contentions raised by petitioner.

5. Whether this case should be remanded to the Court of Appeals or the District Court for further proceedings, or for clarification of the record.

PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS

Petitioner Sanford Bernstein was the plaintiff in the District Court and the Appellant in the Court of Appeals below. Respondents Anthony Padrone, Wulf Heusinger, Thomas Murtaugh, Michael Alvin, Jimmy H. Coleman, Nancy Bernstein, the County of Lehigh, District Attorney William Platt, Dale Yeager, the Catasaqua Police Department, the Allentown Police Department, and Woodrow Keiser, were defendants in the District Court and Appellees in the Court of Appeals. The dismissal of the claims against the remaining defendants named in the complaint (Appendix[1] at A-78) was not challenged in the Court of Appeals.[2]

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1. The Appendix filed herewith pursuant to Supreme Court Rule 21.1.(k) is referred to interchangeably as "Appendix" or "App." The Appendix pages are numbered "A-1" *et seq.* for reference.

2. By Order entered September 29, 1983, the District Court granted a motion to dismiss the complaint filed by the Commonwealth of Pennsylvania, and motions for summary judgment filed by Defendants James McCarthy and Donald Layton (App. at A-4 to A-6); the rulings as to these defendants was not appealed.

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No.____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

SANFORD BERNSTEIN,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, JAMES MCCARTHY, COUNTY OF LEHIGH, WILLIAM PLATT, ANTHONY PADRONE, WULF HEUSINGER, THOMAS MURTAUGH, DONALD LAYTON, DALE YEAGER, MICHAEL ALVIN, JIMMY H. COLEMAN, NANCY H. BERNSTEIN, CATASAUQUA POLICE DEPARTMENT, ALLENTOWN POLICE DEPARTMENT, WOODROW KEISER,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Sanford Bernstein (hereinafter "petitioner" or "Bernstein") respectfully petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit dated January 15, 1986 insofar as the Court of Appeals applied the reasoning of this Court's recent decision in *Wilson v. Garcia*, ____U.S. ____, 105 S.Ct. 1938 (1985), and held that petitioner's civil rights claims under 42 U.S.C. §§ 1981, 1983, 1985(1) (2) & (3) and 1986 are time-barred by Pennsylvania's two-year statute of limitations 42 Pa. Cons. Stat. Ann. § 5524 (Purdon Supp. 1984).

OPINIONS BELOW

The unreported Order of the District Court entered September 29, 1983, dismissing petitioner's claims based upon 42 U.S.C. §§ 1981, 1985 and 1986, on the basis that petitioner's cause of action can be maintained pursuant to 42. U.S.C. § 1983, *Bernstein v. Commonwealth of Pennsylvania, et al.*, E.D.Pa. No. 83-3431, Order Sept. 29, 1983), is reproduced in the Appendix at A-4 to A-6.

The Memorandum Opinion and Order of the District Court entered February 8, 1985, *inter alia*, granting respondents' motions for summary judgment, and entering judgment in favor of respondents and against petitioner regarding the Section 1983 claims (*Bernstein v. Padrone, et. al.*, E.D.Pa. No. 83-3431, Feb. 8, 1985), are reproduced in the Appendix at A-7 to A-15 and A-16 respectively.

The Order/Memorandum of the District Court entered May 13, 1985, denying petitioner's motion for reconsideration on the basis of *Wilson v. Garcia*, ____U.S. ____, 105 S.Ct. 1938 (1985), and rejecting petitioner's claim that respondents' May 1983 conduct extends the two-year limitation period for the conspiracy claims (*Bernstein v. Padrone, et. al*, E.D.Pa. No. 83-3431, Order May 13, 1985), is reproduced in the Appendix at A-17.

The unreported Memorandum Opinion of the Court of Appeals in *Bernstein v. Commonwealth of Pennsylvania, et. al.* No. 85-1371 (3d Cir, Jan. 15, 1986), in which the Third Circuit relied primarily upon its recent decision in *Goodman v. Lukens Steel Co.*, 777 F.2d 113 (3d Cir. 1985)[3] in affirming the District Court's decisions

3. A petition for a writ of certorari in *Goodman v. Lukens, Id.*, raising statute of limitations questions regarding 42 U.S.C. §1981, substantially similar to those set forth here, was filed on April 4, 1986. A copy of the *Lukens Steel* Opinion, and Order amending Opinion, slip op. No. 84-1478 and 84-1509 (Nov. 13, 1985), are reproduced in the Appendix at A-18, and A-71 respectively.

and holding that petitioner's section 1981, 1983, 1985 and 1986 claims are time-barred by Pennsylvania's two-year statute of limitations 42 Pa. Cons. Stat. Ann. § 5524 (Purdon Supp. 1984). is reproduced in the Appendix at A-1 to A-3.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on January 15, 1986. (App. at A-1). This Petition For A Writ of Certiorari is filed within ninety (90) days of that date. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This petition involves consideration of the following statutory provisions: 42 U.S.C. §§ 1981, 1983, 1985, 1986; 42 Pa. Cons. Stat. Ann. §§ 5524, 5527. The full text of each of these statutes is set forth in the Appendix at A-73.

STATEMENT OF THE CASE

On July 18, 1983, petitioner filed a complaint[4] in the United States District Court for the Eastern District of Pennsylvania against Anthony Padrone ("Padrone"), Thomas Murtaugh ("Murtaugh"), Michael Alvin ("Alvin"), Jimmy H. Coleman ("Coleman"), Wulf Heusinger ("Heusinger"), Nancy Bernstein ("Mrs. Bernstein"), District Attorney William Platt, and others[5],

---

4. The complaint with attachments (Exhibit "A" through "G" to the complaint) consists of 190 pages. Accordingly, a copy of the complaint without exhibits is reproduced in the Appendix at A-80; and pursuant to Supreme Court Rule 13, petitioner has requested the Clerk of the United States Court of Appeals for the Third Circuit to certify relevant portions of the record (including the original complaint with exhibits) to this Court.

5. Pursuant to Supreme Court Rule 21.1(b), a complete list of Respondents who were parties in the Court below is set forth *supra*

inter alia, seeking injuctive relief and damages for alleged civil rights violations under 42 U.S.C. §§ 1981, 1983, 1985(1), (2), & (3), and 1986. The district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

The complaint alleges, *inter alia*, that petitioner's estranged wife Nancy Bernstein conspired with police officers (who also worked for her as private security guards), prosecutors and others to have petitioner falsely charged, convicted and imprisoned for solicitation to commit murder; and that after petitioner was convicted, they committed perjury, solicited perjured testimony, intimidated witnesses and otherwise obstructed justice, to keep him in jail, and to block his attempts to overturn the conviction. The complaint alleges that anti-semitism and substantial financial gain motivated the conspiracy, which began in about December, 1978 and continued through July, 1983, when the lawsuit was filed in the district court. (See complaint, *App.* A-80).

Factual Background

The relevant facts, which led to the filing of the complaint, are as follows. On September 24, 1979, petitioner was convicted in the Court of Common Pleas of Dauphin County Pennsylvania,[6] of solicitation to murder his es-

NOTES *(Continued)*

at page ii, together with an explanation of the disposition of claims against party-defendants named in the complaint who are not respondents in these proceedings. *Supra, n.* 2.

6. The criminal complaint was originally filed in Lehigh County, Pennsylvania. After a preliminary hearing, the matter was bound over and District Attorney William Platt filed a criminal information in the Court of Common Pleas of Lehigh County charging, *inter alia*, that petitioner offered $15,000.00 to Respondent Michael Alvin, a part-time, under-cover policeman with the Catasaqua Police Department, to kill Mrs. Bernstein. Due to extensive pre-trial publicity, venue was changed from Lehigh to Dauphin County (*Commonwealth v. Bernstein*, No. 836 C.D. 1979), where the matter was tried.

tranged wife Nancy Bernstein, in violation of 18 Pa. Cons. Stat. Ann. § 902. Post-trial motions were denied and on November 25, 1980, Bernstein was sentenced to serve not less than five nor more than ten years in prison, and ordered to pay a fine of $25,000.00 plus court costs, the maximum penalty under Pennsylvania law. Immediately after sentencing, bail was revoked and petitioner was taken into custody.

An appeal was taken to the Superior Court of Pennsylvania, *inter alia*, on the basis of a March 17, 1980 sworn statement in which key Commonwealth witness Jimmy H. Coleman, recanted his trial testimony. On January 28, 1983, after petitioner had spent more than two years in prison, the Superior Court vacated the sentence and remanded the matter to the trial court for an evidentiary hearing to determine the credibility of Coleman's recantation testimony. *Commonwealth v. Bernstein,* 309 Pa.Super. 573, 455 A.2d 1232 (1983). The Superior Court opinion is reproduced in the Appendix at A-92. The facts related to Coleman's trial testimony and his March 17, 1980 recantation statement, as summarized by the Superior Court in *Bernstein,* at 575, 455 A.2d at 1233-34 [footnotes omitted], are as follows:

> . . . Coleman testified at trial that appellant told him: "I want you to blow my wife away" and asked Coleman to name his price. The next day Coleman informed Mrs. Bernstein and one of her private security guards about this conversation, and they in turn informed the Allentown Police Department. Tony Padrone, an officer of the Catasaqua Police Department, and one of the number of private guards hired by Mrs. Bernstein, contrived with Coleman to arrange a telephone conversation between Coleman and appellant over which Padrone and two other officers, who also worked as private security guards for Mrs. Bernstein, might eavesdrop. In the presence of

Officers Padrone, Layton and Alvin, Coleman advised appellant by telephone that he himself could not carry out the murder but that he could arrange for someone else to do so, and pursuant to the plan of the officers, Coleman subsequently advised appellant that Alvin would be interested in the job. Coleman further testified that appellant subsequently discussed with Alvin, at an arranged meeting, the different methods of and fees for the murder of Mrs. Bernstein and delivered to Alvin the sum of $5,000.00 as partial payment for the murder.

The after-discovered evidence upon which the motion for new trial was based was a recantation statement made by Coleman in which he stated (1) that appellant only kidded about "blowing his wife away"; (2) that, following his meeting with appellant, appellant did not contact Coleman, but, rather the law enforcement officials, who also acted as private security guards for Mrs. Bernstein, were the ones who suggested that Coleman get in touch with appellant; (3) that when appellant met Alvin, Coleman did not hear any discussion concerning a plan for the murder of Mrs. Bernstein; and (4) that the officers employed by Mrs. Bernstein had told him what to say.

Id.

In remanding that matter for an evidentiary hearing, the Superior Court stated:

It is our view, however, that the after-discovered evidence, namely, the allegations in the notarized statement of Mr. Coleman, the principal Commonwealth witness, given six months after the trial, is not merely corroborative, is not merely cumulative and does not merely impeach the credibility of a witness. Rather, the post-trial statements of Mr. Coleman impact not only upon the state of mind of

> appellant during those early discussions which composed a portion of the criminal solicitation, but also upon the defense of appellant that the agents employed to guard the purported victim were provocateurs who stimulated the criminal solicitation. While it may be true that the Commonwealth produced evidence that would have enabled a finding of guilt even without the testimony of Mr. Coleman, a premise of some doubt, the testimony of Mr. Coleman was an integral part of the presentation of the Commonwealth and his testimony concerning the criminal conduct of Mr. Bernstein, as well as the activities of the agents of Mrs. Bernstein, was certainly evidence that would have received careful consideration by the jury. We conclude, therefore, that the after-discovered evidence is of sufficient substance that the Common Pleas Court must hold an evidentiary hearing to determine whether the recantation statement of Mr. Coleman is credible.

Id. at 575, 455 A.2d at 1234.

Pursuant to the Superior Court's remand order, hearings on the recantation issue were held in the Dauphin County Court of Common Pleas on April 4, July 1, August 10, and September 9, 1983. At the commencement of the April 4, 1983 hearing, Coleman asserted his Fifth Amendment privilege after the District Attorney opposed a request for immunity.

On May 5, 1983, without notice to petitioner or his attorney, Coleman was taken to the District Attorney's office by Padrone and Heusinger[7] where he gave a sworn statement (in their presence) to the effect that the substance of his testimony at trial was true, and his March

7. Coleman repeatedly accused Padrone and Heusinger of intimidating him into testifying against Bernstein at trial in the first place, and thereafter threatened him and his family with bodily harm if he changed the story he told at the trial. (See Exhibits "E," "F", and "G" to the complaint.)

17, 1980 recantation was false. Coleman was promised immunity from prosecution for his previous testimony and statements so long as he maintained that his May 5, 1983 statement was truthful and he cooperated with the Commonwealth in its case against Bernstein. (See Exhibit "D" to the complaint).

At the July 1, 1983 hearing, Coleman was granted immunity, the existence of his May 5, 1983 statement was disclosed reluctantly by the District Attorney, and Coleman testified that his recantation was false and his trial testimony was true. It was not until the July 1, 1983 hearing that petitioner learned that as late as May, 1983, Padrone and Heusinger had a hand in manipulating the latest version of Coleman's story. The complaint was filed about two weeks later in a desparate but futile effort to obtain federal injunctive relief to prevent further interference with petitioner's attempt to obtain a fair trial.

On September 9, 1983, the Court of Common Pleas[8] denied petitioner's motion for a new trial, reinstated the sentence, and again ordered that petitioner be taken into custody immediately. An appeal from that judgment was filed on September 21, 1983, which is still pending in the Pennsylvania Superior Court.[9]

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8. Curiously, three different judges presided over the Bernstein criminal case. When the case was transferred from Lehigh to Dauphin County, it was assigned to the Honorable Richard B. Wickersham who presided at trial. After trial but before sentencing, Judge Wickersham became a Superior Court Judge. He was replaced by the Honorable John Dowling who denied the post-trial motions without an evidentiary hearing, imposed the maximum sentence, and revoked bail pending appeal. Judge Dowling also presided at the first evidentiary hearing on remand held April 4, 1983. For reasons unknown to petitioner, Judge Dowling was replaced by the Honorable Clarence C. Morrison, who presided at the other recantation hearings, denied Bernstein's motion for a new trial, and reinstated the sentence originally imposed by Judge Dowling.

9. Although his state court appeal as yet has not been resolved, to date Bernstein has served five full years in prison. He was released on parole on February 16, 1986. Bail was revoked and petitioner was denied bail pending appeal by Judge Dowling on

Bernstein has maintained consistently in the criminal and civil actions that he was "framed", and that he was and is the victim of a continuing conspiracy designed not only to deprive him of his right to due process, but, "to take [him] . . . for everything he's got . . ." as well. (Complaint, para. 40, App. at A-86). To support his claim that Mrs. Bernstein paid co-conspirators (and the "under-cover" police witnesses who also served as her personal security guards in particular), hundreds of thousands of dollars (Complaint, para. 41, App. at A-86, 87), a request for production of documents was served

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November 25, 1980, when Mrs. Bernstein testified that she received annoying telephone calls from someone she thought was her husband, and a detective from the district attorney's office testified that one Dennis Morgan, a former inmate at Northhampton County Prison, said that Bernstein visited him after the trial and asked Morgan to kill Nancy Bernstein and harm or kill Padrone, Murtaugh, and others associated with the district attorney's office. As set forth below, the testimony concerning Morgan was confirmed as false. When the Superior Court remanded the Bernstein criminal matter for a hearing on the after-discovered evidence, petitioner was released on bail pending the outcome of the hearing. He was re-incarcerated on September 9, 1983, when Judge Morrison reinstated the sentence.

On July 31, 1984, Bernstein filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania (*Bernstein v. Ryan, et al.*, No. 84-3700 (E.D. Pa.), which was assigned to Judge Cahn as a matter related to this civil rights action. Judge Cahn rejected petitioner's "futility doctrine" claims, and dismissed the habeas petition for failure to exhaust state judicial remedies on December 10, 1984. Thereafter, that part of the habeas corpus petition which raised claims relating to the improper revocation of bail pending appeal, was reinstated. To prove his claims in that action, petitioner filed a writ of habeas corpus *ad testificandum* requesting the Court to order that Dennis Morgan be brought from an Ohio prison to the Eastern District of Pennsylvania, to testify on Bernstein's behalf. Neither the habeas petition seeking review of the order revoking petitioner's bail, nor the *ad testificandum* habeas petition, were ever ruled upon by the District Court. At the court's request, petitioner's petition for a writ of habeas corpus was withdrawn without prejudice shortly after he was released on parole.

upon Mrs. Bernstein. After considerable resistance, she produced one hundred and forty two checks (142) totalling $200,502.24, which she had paid to the alleged co-conspirators and/or their associates from 1978 through August of 1983. (A copy of Mrs. Bernstein's Response to the Request for Production of Documents is reproduced in the Appendix at A-97 to A-145.) Significantly, $81,042.00 of those checks were paid to the "under-cover" police witnesses after August, 1981; and $71,623.00 of that amount was paid out after the complaint was filed.[10]

Procedural Background

On September 27, 1983, the District Court granted motions to dismiss the complaint which had been filed by District Attorney William Platt, the Commonwealth of Pennsylvania, the Catasaqua Police Department, the Allentown Police Department, and the County of Lehigh; and granted motions for summary judgment which had been filed on behalf of James McCarthy and Donald Layton. The Court also ordered that:

> 18. In regard to all defendants remaining in the case, all of plaintiff's claims based upon 42 U.S.C. §§ 1981, 1985 and 1986 are DISMISSED with prejudice in that plaintiff's alleged cause of action can be maintained pursuant to 42 U.S.C. § 1983. . . .

---

10. Available evidence demonstrated that Mrs. Bernstein paid $156,473.67 directly to the "under-cover" police witnesses; bearer bonds which belonged to petitioner totalling $48,912.63 were also cashed by the police witnesses. The checks and bonds cashed by police witnesses totalled $205,386.30. Checks and bonds totalling another $85,501.76 are reasonably believed to have been paid over to the private security guard/undercover agents, and checks and bonds totalling $8,679.16 are known to have been paid by Mrs. Bernstein to other witnesses who testified at petitioner's criminal trial. The grand total of known direct payments to police witnesses, bonds and cash withdrawals paid to them, and checks and bonds to other witnesses is $299,565.22.

A copy of the District Court's September 27, 1983 Order is reproduced in the Appendix at A-4.

By Memorandum Opinion of February 8, 1985 (Appendix at A-7), the District Court viewed petitioner's claims under 42 U.S.C. § 1983 as causes of action for false arrest or false imprisonment, applied the two (2) year limitation period provided in 42 Pa. Cons. Stat. Ann. § 5524(1) (Purdon Supp. 1984), and held that petitioner's causes of action under § 1983 are barred by the statute of limitations. On the same date the Court entered a final Order granting defendants' motions for summary judgment terminating petitioner's case. Appendix at A-16.

Petitioner's motion for reconsideration was denied by Order entered May 13, 1985 (Appendix at A-17), Judge Cahn noting that since the date of his final Order (App. at A-16), this Court decided *Wilson v. Garcia*, ____U.S. ____, 305 S.Ct. 1938 (1985), which held that for statute of limitations purposes, claims under 42 U.S.C. § 1983 are to be treated as personal injury actions, subject to the same two year limitation period under 42 Pa. Cons. Stat. Ann. § 5524 (2).

On appeal, the United States Court of Appeals for the Third Circuit affirmed, upon the following grounds:

> We agree with the district court that the gravamen of Bernstein's complaint, no matter which of the federal statutes he relies on, is that the defendants conspired to cause him to be falsely arrested and imprisoned. His cause of action arose in March 1980 when he knew, or with reasonable diligence should have known, of the conspiracy.[2]
>
> We have already held that section 1981 actions based on allegedly unlawful acts committed in Pennsylvania brought in federal district courts located in Pennsylvania are governed by the two-year statute of limitations prescribed by 42 Pa. Cons. Stat. Ann. § 5524 (Purdon 1981). *See Goodman v. Lukens Steel*

Co., No. 84-1478 & 84-1509, slip op. at 15-16 (3d Cir. Nov. 13, 1985). Bernstein filed his complaint on July 18, 1983, over three years after his cause of action arose. Consequently, his section 1981 claim is time-barred.

As for his section 1981, 1985, and 1986 claims, Bernstein urges that we not apply to them the same two-year statute of limitations. However, he advances, and we know of, no persuasive reasons for applying a different statute of limitations. We hold that 42 Pa. Cons. Stat. Ann. § 5524 (Purdon 1981) also bars these claims.

2. Federal law determines when the cause of action arose. *Deary v. Three Un-named Police Officers*, 746 F.2d 185, 197 n. 16 (3d Cir. 1984).

The opinion of the Court of Appeals is reproduced in the Appendix at A-1.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD DETERMINE THE APPROPRIATE CHARACTERIZATION OF ACTIONS UNDER 42 U.S.C. §§1981 & 1985

In *Wilson v. Garcia*, ___ U.S. ___, 105 S.Ct. 1938 (1985), this Court recently held that an action under 42 U.S.C. §1983 should be considered a personal injury action for purposes of borrowing an appropriate state statute of limitations.

In September, 1983, the district court in this case dismissed petitioner's claims under 42 U.S.C. §§1981, 1985, and 1986 and the case proceeded as an action under 42 U.S.C. §1983. App. at A-6. Thereafter, relying upon *Wilson v. Garcia*, the district court applied Pennsylvania's two year statute of limitations for personal injury actions, 42 Pa. Cons. Stat. Ann. §5524(2) (Purdon Supp. 1984), ruled that petitioner's section 1983 claims are time-barred, and granted summary judgment in favor of the defendants who remained in the case. App. at A-17.

On appeal, the United States Court of Appeals for the Third Circuit affirmed. *Bernstein v. Commonwealth of Pennsylvania*, No. 85-1371 (3d Cir. Jan. 15, 1986), Appendix at A-1. Relying upon its recent decision in *Goodman v. Lukens Steel Co.*, 777 F.2d 113 (3d Cir. 1985) (see Appendix at A-18), the court below stated that "[w]e have already held that section 1981 actions based on allegedly unlawful acts committed in Pennsylvania brought in federal district courts located in Pennsylvania are governed by the two-year statute of limitations prescribed by 42 Pa. Cons. Stat. Ann. §5524 (Purdon 1981) . . . ." The Court of Appeals held, *inter alia*, that petitioner's claims under 42 U.S.C. §§1981 and 1985 are time-barred. In *Goodman, supra*, the Court of Appeals held that the principles of *Wilson v. Garcia, supra*, were applicable to section 1981 claims.

Although the court below and the district court approached the questions quite differently, for statute of limitations purposes, both courts lumped all of petitioner's civil rights claims together as if only a section 1983 claim was asserted, both held that petitioner's civil rights claims are barred by Pennsylvania's two-year statute of limitations 42 Pa. Cons. Stat. Ann. §5524 (Purdon Supp. 1984), and both reached that result upon the basis of *Wilson v. Garcia*, ____ U.S. ____, 105 S.Ct. 1938 (1985). Accordingly, this case appropriately offers this Court the opportunity to resolve whether the principles announced in *Wilson v. Garcia*, control the selection of the appropriate state statute of limitations for actions brought under 42 U.S.C. §§1981 and 1985, as well. These important questions of federal law regularly affect the due process rights of civil litigants in the federal courts, and should be resolved by this Court.

As indicated above, in reaching its decision in the instant case, the court below relied upon *Goodman v. Lukens Steel Co.*, 777 F.2d 113 (3d Cir. 1985) (*see* slip op. No. 84-1478 & 84-1509, Appendix at A-18, A-26, 27) in ruling that petitioner's section 1981 claim is time-barred. A petition for a writ of certiorari in *Goodman* was filed on April 4, 1986, raising questions related to applicability and retroactivity of *Wilson v. Garcia*, to section 1981 claims, which are substantially identical to those presented here. Accordingly, Petitioner Bernstein joins the Petitioners in *Goodman*, in asking this Court to review these questions, for the reasons set forth in the *Goodman, et al.* Petition (which are incorporated herein by reference), and for the reasons set forth below.

In *Wilson v. Garcia*, this Court reasoned that: under 42 U.S.C. §1988 federal law governs the characterization of §1983 claims for statute of limitations purposes, *id.*, ____U.S. ____, 105 S.Ct. at 1943-44; that it is desirable for all §1983 claims to be given the same characterization, without regard to the specific facts of each case, *id.*, ____U.S. ____, 105 S.Ct. at 1944-47; and held

that in light of the history, purpose and application of section 1983, all claims under that statute should be characterized as personal injury actions, *id.*, ____U.S. ____, 105 S.Ct. at 1947-49. However, *Wilson* does not hold that actions under 42 U.S.C. §1981 or the other reconstruction civil rights statutes are subject to the same characterization. Accordingly, unless this Court sees fit to standardize the characterization of claims under the other provisions, for statute of limitations purposes, as it did in regard to §1983, the federal courts must continue to apply the statute of limitations which would be applicable in the courts of the state in which the federal court is sitting had the action seeking similar relief been brought under state law, on a case-by-case basis. *Polite v. Diehl*, 507 F.2d 119, 122 (3d Cir. 1974) (en banc); *Deary v. Three Un-named Police Officers*, 746 F.2d 185, 197 (3d Cir. 1984). See also, *Board of Regents v. Tomanio*, 446 U.S. 478, 483-4 (1980); *Burnett v. Grattan*, ____ U.S. ____, 104 S.Ct. 2924 (1984).

The Third Circuit, however, has taken a different approach in *Goodman v. Lukens Steel Co.*, 777 F.2d 113 (3d Cir. 1985), upon which its ruling in this case is based. *Goodman*, holds that *Wilson v. Garcia* requires claims under 42 U.S.C. §1981 (as well as §1983) to be characterized as personal injury actions for purposes of selecting the appropriate state statute of limitations. *Id.*, Appendix at A-18. Moreover, the court in *Goodman* applied its decision retroactively, which reduced the limitation period from six to two years.[11] *Id.* Concerning the retroactive application of *Wilson v. Garcia*, the Third Circuit's decision in *Goodman*, conflicts with the decisions

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11. *But see Al-Khazraji v. St. Francis College*, 784 F.2d 505 (3d Cir. 1986), distinguished from *Goodman*, where the Third Circuit, applying the retroactivity principles of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), applied only prospective application of *Wilson v. Garcia* to characterize a cause of action under 42 U.S.C. §1981 for statute of limitations purposes.

of the United States Court of Appeals for the Ninth Circuit. *See Rivera v. Green*, 775 F.2d 1381 (9th Cir. 1985); and *Gibson v. United States*, 781 F.2d 1334 (9th Cir. 1985).[12]

In the Sixth Circuit, the retroactive application of *Wilson v. Garcia*, resulted in the dismissal of plaintiff's claims under 42 U.S.C. §§1983 and 1985. *Mulligan v. Hazzard*, 777 F.2d 340 (6th Cir. 1985). And since *Wilson v. Garcia*, several district courts have characterized section 1981 claims as "personal injury" actions. *See Anderson v. University Health Center*, 623 F. Supp. 795 (W.D. Pa. 1985); *Saldivar v. Cadena*, 622 F. Supp. 949 (W.D. Wisc. 1985); *Berry v. E.I. Dupont De Nemours & Co.*, 625 F. Supp. 1364 (D. Del. 1985); *but see Pender v. National Railroad Passenger Corp.*, 625 F. Supp. 252 (D.D.C. 1985), which stated that section 1983 claims and section 1981 claims are not necessarily governed by the same statute of limitations; *see also, Hobson v. Brennan*, 625 F. Supp. 459 (D.D.C. 1985).[13] The need for

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12. *Rivera* and *Gibson*, *supra*, are both section 1983 cases involving the application of *Wilson v. Garcia*. In *Rivera*, 775 F.2d 1381 (9th Cir. 1985), *Wilson v. Garcia* was applied retroactively and as a result the limitation period was increased from one to two years. *Id.*, at 1384. In *Gibson*, 781 F.2d 1334 (9th Cir. 1985), the Ninth Circuit refused to apply *Wilson* retroactively, where it would have resulted in a shorter limitation period. *Id.*, at 1340.

13. The courts characterized §1981 claims as personal injury actions without reference to the history, purpose, or application of §1981 in *Anderson*, 623 F. Supp. 795 (W.D. Pa. 1985) and *Berry*, 625 F.Supp. 1364 (D. Del. 1985). However, in *Pender*, 625 F.Supp. 252 (D.D.C. 1985), the court stated §1983 and §1981 claims were not necessarily governed by the same statute of limitations because these statutes were passed at different times and seek to remedy different types of civil rights violations. In *Hobson*, 625 F.Supp. 459 (D.D.C. 1985), the court stated that it is not clear that *Wilson* requires that the same statute of limitations which governs §1983 claims also be applied to §1985 actions, but if a single statute must be selected, the statute must provide time for the preparation of a

guidance by this Court is readily apparent.

II. THIS COURT SHOULD RESOLVE WHETHER *WILSON V. GARCIA* SHOULD BE APPLIED RETROACTIVELY

As set forth above, there is a conflict in the circuit courts of appeals on questions related to the retroactive application of *Wilson v. Garcia*, to section 1983 actions. *Compare, Goodman v. Lukens Steel Co.*, 777 F.2d 113 (3d Cir. 1985), Appendix at A-1, with *Rivera v. Green*, 775 F.2d 1381 (9th Cir. 1985); and *Gibson v. United States*, 781 F.2d 1334 (9th Cir. 1985). This case in its present posture raises a related question. If *Wilson v. Garcia* dictates the character of section 1981 and 1985 actions for statute of limitations purposes, does that case have retroactive application to actions brought under 42 U.S.C. §§1981 and 1985. In *Goodman* and in this case with *Goodman* cited as controlling, the Third Circuit has answered both inquiries in the affirmative.

The retroactivity of a newly established principle of law, in general, is controlled by this Court's decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). In *Chevron*, this Court established three criteria by which courts should determine whether to apply statute of limitations decisions retroactively:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding as issue of first impression whose resolution was not clearly foreshadowed . . . Second, it has been stressed that "we must *** weigh the merits and demerits in each case by looking to the prior history of the rule in question, its

complex conspiracy, thereby preferring a three year general statute of limitations for personal injuries rather than a one year statute of limitations for assault, libel and slander claims. *Id.*

> purpose and effect, and whether retrospective operation will further or retard its operation." . . . Finally, we have weighed the inequity imposed by retroactive application, for "[W]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

404 U.S. at 106-07 (citations omitted).

Petitioner submits that the holding of the court below (in terms of retroactivity as well as the applicability of *Wilson v. Garcia* to section 1981 and 1985 actions), produces an inequitable result of the kind *Chevron* was intended to prevent.[14]

Petitioner submits that if *Wilson v. Garcia* did not control the selection of the statute of limitations for his section 1981 and 1985 claims, and was not retroactively applied to his section 1983 claims, his claims would be subject to the six year limitation period prescribed by 42 Pa. Cons. Stat. Ann. §5527, rather than the two year period of 42 Pa. Cons. Stat. Ann. §5524.

Although the Court below agreed with the district court, that the gravamen of petitioner's complaint amounts to a cause of action for false arrest or false imprisonment [subject to a two-year limitation period 42 U.S.C. §5524(1)], petitioner submits that its conclusion in this regard is overly simplistic and erroneous. The common thread that runs through each of petitioner's claims is the element of deceit, trickery, and fraud.

Indeed, petitioner has maintained from the outset that he was the victim of a fraudulent conspiracy by those who wished to deprive him of his liberty, and appropriate his wealth. The brief scenario which follows,

14. This is true, petitioner submits, notwithstanding the correctness of petitioner's claim that the statute of limitations in a continuing conspiracy, runs from the date of the last overt act in furtherance of the conspiracy. See Section III, *infra*.

will suffice to make the point. In 1978 when petitioner and Mrs. Bernstein first separated, both were very well known in the Allentown, Pennsylvania area. For that reason, petitioner sought the services of a non-local private detective to investigate his wife's adultery. Petitioner asked Coleman if he knew an out-of-town investigator, and Coleman introduced him to Alvin. Coleman and Alvin represented to petitioner that Alvin was an investigator from Chicago, that his services were available, but he wanted a $5,000.00 cash retainer in advance. After petitioner and Coleman met Alvin at the airport, they went to his hotel room where petitioner gave Alvin the $5,000.00 in cash he requested as a retainer for his services as a private detective. A few hours later, petitioner was arrested at his home. Alvin and Coleman later testified that Alvin was working as an "undercover" Catasaqua Police Officer, with Padrone, Murtaugh, and other police officers (who also worked for Mrs. Bernstein as private security guards); that Bernstein offered Alvin $15,000.00 to kill Nancy Bernstein and gave him $5,000.00 in advance, to do the job. Petitioner never got the $5,000.00 back; bearer bonds which belonged to petitioner were cashed by the under-cover/private security agents; and Mrs. Bernstein started disposing of petitioner's valuables.

Clearly, these facts (viewed in the light most favorable to petitioner for summary judgment purposes) state a cause of action for fraud and deceit. Actions for fraud and deceit were covered by Pennsylvania six-year statute of limitation, 42 Pa. Cons. Stat. Ann. §5527(6) (Purdons 1981) which covers "any civil action or proceeding which is neither subject to another limitation specified in this sub-chapter nor excluded from the application of a period of limitations by §5531 (relating to no limitation)."

Appendix, at A-77-78.[15] The complaint was filed in July 1983, less than six years from the earliest possible accrual date [November, 1978].

Petitioner was justified in relying on the six-year statute of limitations, which have governed a variety of civil rights claims. *See, Portnoy v. Pennick*, 595 F. Supp. 1000 (M.D. Pa. 1984) (action by investigator for liquor control board who was disciplined for asserting the fifth amendment in state senate proceeding, was subject to six-year state statute of limitations for civil rights action against public officials under 42 U.S.C. §1983); *Safeguard Mutual Insurance Co. v. Miller*, 477 F. Supp. 299, (E.D. Pa. 1979) (where a 42 U.S.C. §1983 complaint alleged that state insurance officials conspired to prevent insurers from conducting lawful insurance business, the six-year limitations period for interference with business and contractual relations governed, notwithstanding that some of the overt acts involved defamation and some simple trespass to property); *Dupree v. Hertz Corp.*, 419 F. Supp. 764 (E.D. Pa. 1976) (six year limitation for actions on contract was applied in employment discrimination class action brought under Civil Rights Act dealing with conspiracies to deprive persons of rights or privileges in violation of 42 U.S.C. §§1981, 1983 and 1985. Moreover, even if the applicable statute of limitations was an unresolved issue, so long as petitioner took a reasonable position, retroactive reduction of the statute of limitations in the present case is insupportable. *See Mineo v. Port Authority of New York & New Jersey*, 779 F.2d 939 (3d Cir. 1985).

In the instant case, *Wilson v. Garcia*, cannot be applied retroactively, without undermining the principles established in *Chevron*, 404 U.S. 97 (1971).

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15. 42 Pa. Con. Stat. Ann. §5524(7) now prescribes a two-year limitation period for actions based upon fraud or deceit. [amended December 20, 1982, Pa. L. 1409, No. 326, art. II, §201 effective in 60 days]. Appendix at A-78-79.

III. THIS COURT SHOULD ESTABLISH A UNIFORM STANDARD FOR DETERMINING THE DATE THE STATUTE OF LIMITATIONS BEGINS TO RUN IN CONTINUING CONSPIRACY CASES

The date a civil rights cause of action accrues and the limitation period begins to run is determined by federal law. *Cope v. Anderson*, 331 U.S. 461, 464 (1947); *Fisher v. Whiton*, 317 U.S. 217, 220 (1942); *Rawlings v. Ray*, 312 U.S. 96, 98 (1941); *Deary v. Three Un-named Police Officers*, 746 F.2d 185, 197 n. 16 (3d Cir. 1984). This question is of equal, if not greater importance than the selection of the appropriate statute of limitations in a case such as this, where an ongoing conspiracy involving a continuing pattern of overt acts, including the payment of more than $200,000 to corrupt police officials, is alleged. The decision of the Court below, that for statute of limitations purposes, petitioner's ". . . cause of action arose in March 1980 when he knew, or with reasonable diligence should have known, of the conspiracy . . ." *Bernstein*, No. 85-1371 (3d Cir. Jan. 15, 1986), App. at A-2, *citing Deary*, conflicts not only with the decisions of other circuit courts which hold that in conspiracy cases, the limitation period begins to run with each overt act causing damage, *Buford v. Tremayne*, 747 F.2d 445 (8th Cir. 1984); *White v. Bloom*, 621 F.2d 276, 281 (8th Cir. 1980), *cert. denied*, 449 U.S. 995 (1981); *Blackwelder v. Millman*, 522 F.2d 766 (4th Cir. 1975); *Bergschneider v. Denver*, 446 F.2d 569 (9th Cir. 1971), but with prior law in the Third Circuit as well. *Wells v. Rockefeller*, 728 F.2d 209 (3d Cir. 1984).

This Court has held that in criminal conspiracy cases, the statute of limitations runs from the last overt act during the existence of the conspiracy. *Fiswick v. United States*, 329 U.S. 211, 216 (1946); *Brown v. Elliot*, 225 U.S. 392, 401 (1912). The ruling of the court below is contrary to the teachings of these cases. Petitioner submits that there is no reason that a different rule

should govern conspiracy cases in civil rights litigation, that this Court should fix a uniform standard to determine the time the statute of limitations begins to run in all federal conspiracy cases, and that this case offers the opportunity to make that determination and put these questions to rest.

IV. THIS COURT SHOULD EXERCISE ITS POWER OF SUPERVISION TO REVIEW THE DECISIONS OF THE COURTS BELOW

To be sure, petitioner's claims of police and official corruption have not won him a great deal of popularity in the Allentown, Pennsylvania area. But the subject civil rights legislation was not intended to protect the popular. Despite petitioner's claims that as late as May, 1983, the recanting witness was coerced into retracting his recantation testimony, and indisputable evidence that large sums of money were paid to the alleged perpetrators less than two years before (and even after) the complaint was filed, the district court rejected these contentions summarily, and the court of appeals did not even address them. Indeed, it appears that the courts below have made short shrift of meritorious arguments to facilitate the dismissal of petitioner's unpopular claims without a trial. It is assumed that in this day and age where official corruption is an everyday occurrence and police corruption trials consume a good portion of the federal courts' time, as a matter of policy, this Court will jealously protect the federal courts from unwittingly being influenced in favor of would-be law enforcement authorities, especially in a sensitive case like this, where an unpopular litigant has raised sensitive questions about important persons in a small closely-knit community. Petitioner submits that by affirming the decision of the district court dismissing all of petitioner's claims upon the grounds and in the manner herein set forth, the court of appeals below has sanctioned a departure so far from the

acceptable and usual judicial standards, as to warrant the exercise of this Court's power of supervision.

In this context, petitioner notes that on appeal, the court below ignored petitioner's contentions: that the statute of limitations was tolled by overt acts in furtherance of a continuing conspiracy; that his claims under 42 U.S.C. §§1981, 1985, and 1986, were improvidently dismissed by the district court at the early stages of the proceedings. (See section "V", *supra*); that District Attorney Platt's Motion to Dismiss should have been denied; and that summary judgment was improperly granted in favor of Lehigh County.[16]

V. ALTERNATIVELY, THIS COURT SHOULD CONSIDER REMANDING THIS CASE FOR FURTHER PROCEEDINGS, OR FOR CLARIFICATION

At the early stages of the litigation, the district court dismissed petitioner's claims under 42 U.S.C. §§1981, 1985, and 1986 "with prejudice in that plaintiff's alleged cause of action can be maintained pursuant to 42 U.S.C. §1983 . . ."[17] Appendix at A-4. Thereafter, the district court ruled only that petitioner's section 1983 claims are barred by the applicable two-year statute of limitations, and on that basis granted summary judgment in favor of

16. Platt's Motion to Dismiss was based on prosecutorial immunity. However, there was an allegation supported by factual evidence in response to petitioner's motion for production of documents, demonstrating that Mrs. Bernstein made one or more payments to Platt or his campaign fund. For purposes of a motion to dismiss, the facts alleged in the complaint are viewed as true. Moreover, receipt of funds falls outside the scope of Platt's duties as a prosecutor, rendering immunity inapplicable. Lehigh County's motion for summary judgment was based upon a solicitor's affidavit on information and belief. F.R.Civ.P. 56(e) requires summary judgment affidavits to be made on personal knowledge. The motion for summary judgment should have been denied.

17. Petitioner has maintained consistently that there is no legal authority to justify the dismissal of his section 1981, 1985, and 1986 claims on this basis.

the defendants remaining in the case. *See Bernstein v. Padrone*, No. 83-3431, slip op. (E.D. Pa. Feb. 8, 1985), (App. at A-7 - A-15), Order entered Feb. 8, 1985 (App. at A-16), and Order on Reconsideration entered May 13, 1985 (App. at A-17).

On appeal to the Third Circuit, petitioner claimed, *inter alia*, that the district court improperly ruled that his cause of action under 42 U.S.C. §1983 was time-barred; and that the district court improperly dismissed his section 1981, 1985, and 1986 claims for the reasons set forth above. The Court of Appeals did not address the question of whether the section 1981, 1985, and 1986 claims were properly dismissed.[18] Regarding these claims, the court below stated: "As for his section 1981, 1985, and 1986 claims, Bernstein urges that we not apply to them the same two-year statute of limitations. However, he advances,[19] and we know of, no persuasive reasons for applying a different statute of limitations. We hold that 42 Pa. Cons. Stat. Ann. §5524 (Purdon 1981) also bars these claims." Appendix A-3. In sum, the court below ruled on questions which were not before it, and failed to rule on questions that were. Petitioner submits that he is entitled to an intelligent review of his claims on appeal and asks this court to exercise its supervisory authority to grant the relief requested below.

If this Petition for a Writ of Certiorari to review the substantive questions set forth above is not granted, petitioner requests in the alternative, that this case be remanded for further proceedings or for clarification of the

18. Indeed, the court below did not expressly hold that petitioner's claim under 42 U.S.C. §1983, is barred by the statute of limitations. However, it did affirm the decision of the district court which addressed the statute of limitations question in terms of §1983 only.

19. Reasons for the application of a different limitation period to the section 1981, 1985, and 1986 were not advanced on direct appeal because the district court did not dismiss the claims under these sections on the basis of the statute of limitations; therefore, the question was not before the Court of Appeals.

record, either: 1) to the court of appeals below to determine whether in its view, the district court properly dismissed petitioner's claims under 42 U.S.C. §§1981, 1985 and 1986; or 2) to the district court to determine whether in its view, the section 1981, 1985, and 1986 claims are barred by the statute of limitations.

CONCLUSION

For the reasons set forth above, petitioner respectfully requests that this petition be granted, and that this Court issue a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully Submitted,

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85-1691

No.____

Supreme Court, U.S.
FILED
APR 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

SANFORD BERNSTEIN,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, JAMES MCCARTHY, COUNTY OF LEHIGH, WILLIAM PLATT, ANTHONY PADRONE, WULF HEUSINGER, THOMAS MURTAUGH, DONALD LAYTON, DALE YEAGER, MICHAEL ALVIN, JIMMY H. COLEMAN, NANCY B. BERNSTEIN, CATASAUQUA POLICE DEPARTMENT, ALLENTOWN POLICE DEPARTMENT, WOODROW KEISER,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX

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APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-1371

SANFORD BERNSTEIN,

Appellant

v.

COMMONWEALTH OF PENNSYLVANIA, JAMES MCCARTHY, COUNTY OF LEHIGH, WILLIAM PLATT, ANTHONY PADRONE, WULF HEUSINGER, THOMAS MURTAUGH, DONALD LAYTON, DALE YEAGER, MICHAEL ALVIN, JIMMY H. COLEMAN, NANCY B. BERNSTEIN, CATASAUQUA POLICE DEPARTMENT, ALLENTOWN POLICE DEPARTMENT, WOODROW KEISER,

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 83-3431)
District Judge: Hon. Edward N. Cahn

Submitted Under Third Circuit Rule 12(6)
January 14, 1986
Before: SEITZ and GIBBONS, *Circuit Judges*
and BARRY, *District Judge*[*]

(Opinion Filed: January 15, 1986)

---

[*] Hon. Maryanne Trump Barry, United States District Judge for the District of New Jersey, sitting by designation.

MEMORANDUM OPINION OF THE COURT

GIBBONS, *Circuit Judge:*

Sanford Bernstein appeals from a final judgment dismissing his federal and pendent state law claims. In his complaint Bernstein alleged that the defendants — the County of Lehigh, its prosecutor, and various other individuals and entities — conspired, in violation of sections 1981, 1983, 1985, and 1986 of title 42 of the United States Code and in violation of Pennsylvania law, to cause him to be falsely charged with and convicted of criminal solicitation of the murder of his ex-wife.

The district court granted summary judgment in favor of the County of Lehigh on the ground that since it had no policy of encouraging the kind of conspiracy alleged there was no basis for imposing on it liability premised upon the principle of respondeat superior. It likewise granted summary judgment in favor of the county prosecutor, holding that he was absolutely immune from suit. As to the remaining defendants, it granted summary judgment on statute of limitation grounds. Because the claims against all these defendants were untimely, the district court correctly dismissed them.[1]

We agree with the district court that the gravamen of Bernstein's complaint, no matter which of the federal statutes he relies on, is that the defendants conspired to cause him to be falsely arrested and imprisoned. His cause of action arose in March 1980 when he knew, or with reasonable diligence should have known, of the conspiracy.[2]

---

1. Furthermore, we find no error in the district court decisions concerning the vicarious liability of the county and the immunity of its prosecutor.

2. Federal law determines when the cause of action arose. *Deary v. Three Un-named Police Officers*, 746 F.2d 185, 197 n.16 (3d Cir. 1984).

We have already held that section 1981 actions based on allegedly unlawful acts committed in Pennsylvania brought in federal district courts located in Pennsylvania are governed by the two-year statute of limitations prescribed by 42 Pa. Cons. Stat. Ann. § 5524 (Purdon 1981). *See Goodman v. Lukens Steel Co.*, No. 84-1478, slip op. at 15-16 (3d Cir. Nov. 13, 1985). Bernstein filed his complaint on July 18, 1983, over three years after his cause of action arose. Consequently, his section 1981 claim is time-barred.

As for his section 1981, 1985, and 1986 claims, Bernstein urges that we not apply to them the same two-year statute of limitations. However, he advances, and we know of, no persuasive reasons for applying a different statute of limitations. We hold that 42 Pa. Cons. Stat. Ann. § 5524 (Purdon 1981) also bars these claims.

Finally, Bernstein contends that the district court erred in dismissing his pendent state law claims. There was no error. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726-27 (1966). No federal court order is required to accomplish a transfer of those claims to an appropriate state court pursuant to 42 Pa. Cons. Stat. Ann. § 5103(b)(2) (Purdon Supp. 1985).

The judgment appealed from will therefore be affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 83-3431

SANFORD BERNSTEIN

v.

COMMONWEALTH OF PENNSYLVANIA, et al.

ENTERED: 9/29/83
CLERK OF COURT

ORDER

AND NOW, this 27th day of September, 1983, IT IS ORDERED as follows:

1. Plaintiff's request for preliminary injunctive relief is now moot in that his attorney has orally withdrawn plaintiff's request for preliminary injunctive relief. Therefore, plaintiff's motion to reconsider this court's denial of preliminary injunctive relief is also moot.

2. The motion to dismiss filed on behalf of William Platt, the District Attorney of Lehigh County, is GRANTED on the ground that the alleged cause of action against this defendant is related solely to his prosecutorial activities.

3. The motion to dismiss filed on behalf of the Commonwealth of Pennsylvania is GRANTED on the grounds that the Eleventh Amendment to the United States Constitution precludes plaintiff's cause of action against it and because no cause of action against the Commonwealth of Pennsylvania has been well pleaded in the complaint.

4. The motion of the Catasauqua Police Department to dismiss all claims aginst it is GRANTED on the ground that this defendant is not an entity amenable to suit.

5. The motion of the Allentown Police Department to dismiss all claims against it is GRANTED on the ground that this defendant is not an entity amenable to suit.

6. The motion for summary judgment filed on behalf of the County of Lehigh is GRANTED and judgment is hereby entered in favor of the County of Lehigh and against the plaintiff on the ground that the affidavit of David K. Bausch has not been controverted by the plaintiff.

7. The motion for summary judgment filed on behalf of James McCarthy and Donald Layton is GRANTED on the grounds that plaintiff has not controverted defendants' affidavits and has not raised disputed facts in regard to the statute of limitations defense.

8. The motion to dismiss filed on behalf of defendant, Thomas Murtaugh, is DENIED without prejudice to his raising factual and legal issues by filing a motion for summary judgment.

9. The motion to dismiss filed on behalf of defendant, Dale Yeager, is DENIED without prejudice to his raising factual and legal issues by filing a motion for summary judgment.

10. The motion to dismiss filed on behalf of defendant, Anthony Pardone, is DENIED without prejudice to his raising factual and legal issues by filing a motion for summary judgment.

11. The motion to dismiss filed on behalf of defendant, Michael Alvin, is DENIED without prejudice to his raising factual and legal issues by filing a motion for summary judgment.

12. The motion to dismiss filed on behalf of defendant, Wulf Heusinger, is DENIED without prejudice to his raising factual and legal issues by filing a motion for summary judgment.

13. The motion of defendant, Nancy Bernstein, to dismiss is DENIED. The motion of defendant, Nancy Bernstein, for summary judgment is DEFERRED to permit the plaintiff and the defendant to engage in discovery.

14. In regard to all defendants who filed motions to dismiss and whose motions to dismiss were denied, said defendants are directed to file answers to plaintiff's complaint within 15 days from the date of this order or are directed to file motions for summary judgment within 15 days of the date of this order.

15. Discovery in the within case shall be completed by November 30, 1983.

16. Argument on all pending motions shall be held on Friday, December 16, 1983, at 11:00 A.M. in Courtroom 2, Old Lehigh County Courthouse, 501 Hamilton Street, Allentown, Pennsylvania.

17. The within case is placed on the trial list for January, 1984.

18. In regard to all defendants remaining in the case, all of plaintiff's claims based upon 42 U.S.C. §§ 1981, 1985 and 1986 are DISMISSED with prejudice in that plaintiff's alleged cause of action can be maintained pursuant to 42 U.S.C. § 1983.

BY THE COURT:

_____

Edward N. Cahn, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 83-3431

SANFORD BERNSTEIN

v.

ANTHONY PADRONE,
WULF HEUSINGER,
THOMAS MURTAUGH,
DALE YEAGER,
MICHAEL ALVIN,
JIMMY H. COLEMAN,
NANCY M. BERNSTEIN

MEMORANDUM OPINION

CAHN, J. February 8, 1985

Before the court in this civil rights action are defendants' motions for summary judgment. Defendants contend, *inter alia*, that plaintiff's cause of action is barred by the statute of limitations. I agree and grant summary judgment for defendants for the reasons stated herein.[1]

I. BACKGROUND

On September 24, 1979, plaintiff Sanford Bernstein was convicted in the Court of Common Pleas of Dauphin County of criminal solicitation to murder his estranged wife, Nancy M. Bernstein. At trial, Commonwealth witness Jimmy H. Coleman testified that plaintiff had offered to pay Coleman to kill plaintiff's wife. Coleman

1. Defendants also contend that summary judgment is warranted on the basis of collateral estoppel, immunity from suit, lack of factual allegations in support of the conspiracy claim, and lack of subject matter jurisdiction. In view of my holding that plaintiff's action is barred by the statute of limitations, I find it unnecessary to reach these other contentions.

testified that he related this conversation to Mrs. Bernstein, who in turn informed Donald Layton and Anthony Padrone, members of the Allentown and Catasauqua Police Departments, respectively. These police officers also worked as Mrs. Bernstein's private security guards.[2]

In conjunction with the police investigation of this matter, Coleman called plaintiff to tell him that he would not kill Mrs. Bernstein but knew someone, "Al Alvini," who would. In fact, "Alvini" was Michael Alvin, a part-time undercover narcotics agent for the Catasauqua Police Department. According to trial testimony, Coleman arranged a meeting between plaintiff and Alvin at which plaintiff agreed to pay Alvin $15,000 to kill Mrs. Bernstein and gave Alvin an advance payment of $5,000. Plaintiff was subsequently arrested, charged, and convicted of soliciting his wife's murder.

On March 17, 1980, Coleman made a statement in which he recanted portions of his trial testimony. Bernstein filed a motion for a new trial based, in part, on this newly discovered evidence. The motion was denied on October 23, 1980, and sentence was imposed on November 25, 1980. Plaintiff appealed this judgment. On January 28, 1983, the Superior Court vacated the judgment and remanded for an evidentiary hearing on the issue of newly discovered evidence. *Commonwealth v. Bernstein,* 309 Pa. Super. 573, 455 A.2d 1232 (1983).[3]

2. Mrs. Bernstein testified at trial that, before her conversation with Coleman, she had arranged to have three off-duty police officers act as her private security guards because of threats made against her by plaintiff. These were Anthony Padrone and Thomas Murtaugh of the Catasauqua Police Department and Donald Layton of the Allentown Police Department. Following her conversation with Coleman, she testified that she arranged to have seven additional off-duty policemen provide her with twenty-four hour security.

3. The court also concluded that there was no merit to the other issues raised on appeal (alleging the ineffective assistance of counsel and unconstitutionality of the sentence imposed).

On September 9, 1983, after holding three evidentiary hearings on the issue of newly discovered evidence, the Court of Common Pleas denied petitioner's motion for a new trial and reinstated sentence. Petitioner filed an appeal from that judgment on September 21, 1983. That appeal is currently pending in state court.

On July 18, 1983, plaintiff brought this action pursuant to 42 U.S.C. § 1983. The gravamen of his complaint is that the defendants, acting under color of state law, conspired to "frame" him for solicitation of murder. Plaintiff claims that defendants collectively committed perjury, encouraged perjury by various Commonwealth witnesses, illegally searched his residence, and intimidated witnesses so they would not testify. Based on these alleged deprivations of his rights, plaintiff seeks declaratory and injunctive relief as well as compensatory and punitive damages.

II. MOTIONS FOR SUMMARY JUDGMENT

In their summary judgment motions, defendants contend that a two-year statute of limitations is applicable to the claims advanced by plaintiff and that, applying this limitations period, plaintiff's claims are time-barred.

In determining the appropriate limitations period to apply to cases brought under 42 U.S.C. § 1983, the rule in this circuit is that "[s]ince the Civil Rights Acts contain no statute of limitations, the limitation to be applied is that which would be applicable in the courts of the state in which the federal court is sitting had an action seeking similar relief been brought under state law." *Polite v. Diehl*, 507 F.2d 119, 122 (3d Cir. 1974) (en banc); *Deary v. Three Un-named Police Officers*, 746 F.2d 185, 197 (3d Cir. 1984). *See also, Board of Regents v. Tomanio*, 446 U.S. 478, 483-4 (1980); *Burnett v. Grattan*, ____U.S. ____, 104 S.Ct. 2924 (1984). Had Bernstein's action been brought under state law, it would most resemble a cause of action for false arrest or false

imprisonment. *See Sandutch v. Muroski*, 684 F.2d 252, 254 (3d Cir. 1982); *Gaito v. Strauss*, 249 F. Supp. 923, 931-2 (W.D. Pa. 1966), *aff'd*, 368 F.2d 787 (3d Cir. 1966), *cert. denied*, 386 U.S. 977 (1967). Under Pennsylvania law, these actions are subject to a two-year limitations period. 42 Pa. Cons. Stat. Ann. § 5524(1) (Purdon Supp. 1984).[4]

Federal law determines the date of accrual of a § 1983 cause of action. *Deary v. Three Un-named Police Officers*, 746 F.2d at n. 16. Plaintiff's civil rights cause of action accrues when the plaintiff knew or had reason to know of the injury that constitutes the basis of this action. *Sandutch v. Muroski*, 684 F.2d at 254; *Mitchell v. Hendricks*, 431 F. Supp. 1295, 1298 (E.D. Pa. 1977). The record in this case establishes that, as a matter of law, plaintiff's cause of action accrued at the latest by March, 1980, when he learned of Coleman's recantation.[5]

In reaching this conclusion, I am guided by the court's analysis in the *Sandutch* opinion. In that case, Sandutch claimed that public officials had conspired to violate his constitutional rights by obtaining a fraudulent statement from a co-conspirator, James Mastrota. Sandutch further alleged that the defendants used this statement in a prosecution against him. At a preliminary hearing Mastrota had linked Sandutch to certain crimes. After the preliminary hearing but before Sandutch's

4. Reference to the other statutes of limitations enacted by the Pennsylvania Legislature suggests that application of the two-year period is appropriate. The various limitations periods applicable to civil actions are set out at 42 Pa. Cons. Stat. Ann. §§ 5521-5531 (Purdon 1981 & Supp. 1984).

5. In so ruling, I do not reach the question of whether plaintiff's cause of action could be said to have accrued at the time of trial, when he first would have known of the alleged false testimony. As stated above, plaintiff's cause of action accrued *at least* by the time of Coleman's recantation statement in March, 1980. In either case, the effect of applying the two-year statute of limitations would be identical.

trial, Mastrota recanted this testimony. At the trial, which took place in 1976, the prosecution introduced Mastrota's preliminary hearing testimony. Sandutch knew at the time of the trial that Mastrota had recanted this testimony, and he attacked Mastrota's statement as fraudulent and obtained by duress. In September, 1980, Sandutch obtained an affidavit in which Mastrota explained the circumstances under which the incriminating statement was obtained. Two weeks later, Sandutch filed the civil rights suit. Under those circumstances, the court of appeals held that Sandutch's action was barred by the statute of limitations[6] because Sandutch had reason to know of the alleged conspiracy to secure false testimony when he first learned of Mastrota's recantation in 1976, but waited until 1980 to file suit. The court specifically stated that:

> Although at that time Sandutch may not have known all the facts necessary to establish that the defendants conspired to deprive him of his rights, his 1976 knowledge of the alleged falsity of Mastrota's statement obtained under duress should have led, by the exercise of due diligence, to the awareness that he had a cause of action. The statute began to run then.

684 F.2d at 254.

Similarly, in the present proceeding, plaintiff had reason to know of the alleged conspiracy at least when he became aware of Coleman's recantation statement in March, 1980. Coleman specifically stated, for example, that he gave false trial testimony at the direction of police

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6. The district court applied the limitations period established by Pennsylvania statute for the analogous state law torts of false arrest and false imprisonment. At that time, those periods were two years and one year, respectively.

officers involved in the investigation. This type of information should certainly, through the exercise of due diligence, have made plaintiff aware that he had a cause of action under §1983.

Plaintiff contends that the conspiracy continues to the present day as defendants attempt to conceal their prior illegal actions and frustrate plaintiff's efforts to overturn his conviction. Even assuming that plaintiff's allegations regarding defendants' activities are true, these actions are not sufficient to postpone the accrual of the statute of limitations for conspiracy to "frame" plaintiff for soliciting his wife's murder. As was stated in *Gaito v. Strauss:*

> The allegedly continuous and successful efforts by the defendants . . . to thwart and harass plaintiff's attempts to overturn the convictions cannot be regarded as additional overt acts in furtherance of the conspiracy so as to interminably toll the statute of limitations with regard to the alleged fraudulent procurement of the convictions, but must rather be regarded as elements of continuing damage accruing from the culmination of the alleged conspiracy. . . . [S]uch post-sentencing activity by the defendants does not prevent the application of the one-year statute of limitations to any alleged misbehavior by the defendants in connection with the institution, progress, and culmination of the pertinent criminal proceedings.

249 F. Supp. at 932.

Moreover, despite plaintiff's conclusory allegations of continuing conspiracy, the record fails to establish any post conviction conduct on the part of defendants for which plaintiff may seek relief.[7]

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7. Plaintiff alleges that William Platt, District Attorney for Lehigh County, violated his rights by refusing to grant Coleman immunity from prosecution for his recantation statement. Platt has already been dismissed as a defendant from this lawsuit because all

As discussed above, plaintiff's cause of action accrued at least by March, 1980. Plaintiff did not bring this suit until July, 1983, well after the expiration of the applicable two-year limitations period. This suit is, therefore, time-barred unless the running of the statute has been tolled.

When borrowing a state period of limitations in a civil rights case, a federal court will also adopt the state's rules for tolling that statute as long as policies underlying the federal cause of action are not undermined. *Swietlowich v. County of Bucks*, 610 F.2d 1157, 1162 (3d Cir. 1979). *See also Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 464-5 (1975); *Board of Regents v. Tomanio*, 446 U.S. at 483-6. Whenever suit is filed after the limitations period, as it was in this case, the burden is on plaintiff to establish that the statute has been tolled. *Swietlowich v. County of Bucks*, 610 F.2d 1157 at 1162. I find that plaintiff has failed to sustain this burden.

Plaintiff contends that the statute was tolled by defendants' continuing efforts to conceal the conspiracy. Under Pennsylvania law, the limitation period does not commence in cases of fraudulent concealment until the time of discovery of the date when, with reasonable diligence, one would have been led to discovery. *Id.* As discussed earlier in this opinion, as of March, 1980, plaintiff was aware of facts that, through the exercise of due diligence, would have led him to discover that he had a

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claims against him relate to activities for which he is entitled to absolute immunity as a prosecuting attorney. Plaintiff also claims that Coleman attempted to extort money from him in exchange for favorable testimony at a post-conviction evidentiary hearing. This allegation does not state a claim under §1983 because Coleman is not a public official and plaintiff does not allege that Coleman acted in conspiracy with any public officials in making this offer. *See Chicarelli v. Plymouth Gardens Apartment*, 551 F. Supp. 532 (E.D. Pa. 1982). The other acts of which plaintiff complains took place more than two years before plaintiff filed suit. Any causes of action arising from such acts are barred by the statute of limitations.

cause of action against defendants. Under these circumstances, there is no basis for tolling the statute of limitations because of fraudulent concealment.

Nor should the limitations period be tolled by plaintiff's incarceration. Under Pennsylvania law, the statute of limitations is not tolled merely because plaintiff is incarcerated, *Sandutch v. Muroski*, 684 F.2d at 254, and plaintiff has presented no special factors which would make tolling appropriate in this case. *See also Getz v. Bruch*, 400 F. Supp. 1033, 1036 (E.D. Pa. 1975); *Moore v. McComsey*, 313 Pa. Super. 264, 459 A.2d 841 (1983); *Jones v. Bombeck*, 375 F.2d 737, 739 (3d Cir. 1967).

Finally, plaintiff argues that the statute of limitations should have been tolled with respect to his §1983 claim while he challenged his criminal conviction in state court. I disagree, finding no basis in Pennsylvania law for this assertion. Pennsylvania's general limitations rule provides that:

> An action, proceeding or appeal must be commenced within the time specified in or pursuant to this chapter unless, in the case of a civil action or proceeding, a different time is provided by this title or another statute or a shorter time which is not manifestly unreasonable is prescribed by written agreement.

42 Pa. Cons. Stat. Ann. §5501(a) (Purdon Supp. 1984). Judicial extensions of the limitations period are governed by 42 Pa. Cons. Stat. §5504 (Purdon 1981), which states that, except as provided by statute, "the time limited by this chapter shall not be extended by order, rule or otherwise." §5504(a). No section of the limitations statute provides that the time for filing a cause of action in a civil case is tolled during the period in which a litigant challenges a related state court criminal conviction. Nor am I aware of any other authority that supports this position. Under these circumstances, plaintiff's argument must be rejected. *See Moore v. McComsey*, 313 Pa. Super. at

271, 459 A.2d at 845 (the fact that appellant filed a Post Conviction Hearing Act petition in his criminal action was inadequate to toll the statute of limitations for the related civil action); *Singleton v. City of New York*, 632 F.2d 185, 191-2 (2d Cir. 1980), *cert. denied*, 450 U.S. 920 (1981) (statute was not tolled for plaintiff's §1983 action while state criminal prosecution was pending againt him). *Cf. Board of Regents v. Tomanio*, 446 U.S. at 449 (time for filing a §1983 action is not tolled while litigant pursues a related, but independent, cause of action in state court.

The record presents no evidence of special circumstances that make application of these provisions of Pennsylvania law inconsistent with the policies underlying the civil rights acts. Accordingly, I find that plaintiff's cause of action under §1983 is barred by the statute of limitations.[8]

BY THE COURT:

Edward N. Cahn, J.

8. Plaintiff's claims under the First, Fourth, Sixth, Eighth, and Fourteenth Amendments to the Constitution are dismissed. The availability of relief under 42 U.S.C. §1983 precludes a cause of action directly under the Constitution, notwithstanding the fact that a plaintiff's §1983 claims are barred by the statute of limitations. *Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981). *See also Shirey v. Bensalem Township*, 501 F. Supp. 1138 (E.D. Pa. 1980), appeal dismissed, 663 F.2d 472 (3d Cir. 1981). Plaintiff's state law claims are also dismissed. In light of the grant of summary judgment for defendants on the federal claim, there is no basis for subject matter jurisdiction over the pendent state claims. *See United Mineworkers v. Gibbs*, 383 U.S. 715, 726 (1966).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 83-3431

SANFORD BERNSTEIN

v.

ANTHONY PADRONE,
WULF HEUSINGER,
THOMAS MURTAUGH,
DALE YEAGER,
MICHAEL ALVIN,
JIMMY H. COLEMAN,
NANCY M. BERNSTEIN

ORDER

AND NOW, this 8th day of February, 1985, IT IS HEREBY ORDERED that:

1. Defendants' motion for summary judgment is GRANTED.

2. Judgment is hereby ENTERED in favor of all defendants and against the plaintiff in regard to plaintiff's claims pursuant to 28 U.S.C. §1983.

3. Plaintiff's state law claims are DISMISSED.

4. Plaintiff's claims under the First, Fourth, Sixth, Eighth, and Fourteenth Amendments are DISMISSED.

5. This is a final order terminating plaintiff's case.

BY THE COURT:

Edward N. Cahn, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 83-3431

SANFORD BERNSTEIN

[ENTERED: 5/13/85
CLERK OF COURT]

v.

ANTHONY PADRONE, et al.

ORDER

AND NOW, this 3rd day of May, 1985, upon consideration of plaintiff's motion for reconsideration and the responses thereto, IT IS ORDERED that the motion is DENIED.[1]

BY THE COURT:

Edward N. Cahn, J.

1. In my February 8, 1985, opinion I applied the two year limitations period applicable to false arrest and false imprisonment under Pennsylvania law. 42 Pa. Cons. Stat. Ann. §5524(1) (Purdon Supp. 1984). Since that time, the United States Supreme Court has held that, for purposes of choosing the applicable state limitations period, §1983 claims are to be treated as personal injury actions. *Wilson v. Garcia*, 53 U.S.L.W. 4481 (U.S. April 17, 1985). Under Pennsylvania law, personal injury actions are also subject to a two-year limitations period, 42 Pa. Cons. Stat. Ann. §5524(2) (Purdon Supp. 1984). Because the limitations periods are the same for either cause of action, the analysis in the February, 1985, opinion is still valid. Plaintiff's contention that a six-year limitations period should apply is clearly incorrect.

I also reject plaintiff's contention that defendants' alleged actions in May, 1983, would extend the two-year limitations period for conspiracy to "frame" him for soliciting his wife's murder. *See Bernstein v. Padrone*, No. 83-3431, slip op. at 7-8 (E.D. Pa. Feb. 18, 1985); *Gaito v. Strauss*, 249 F. Supp. 923, 932-33 (W.D. Pa. 1966), *aff'd*, 368 F.2d 787 (3d Cir. 1966), *cert. denied*, 386 U.S. 977 (1967).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-1478 & 84-1509

CHARLES GOODMAN, RAMON L. MIDDLETON, ROMULUS C. JONES, JR., AND LYMAS L. WINFIELD, on their own behalf and on behalf of others similarly situated.

and

UNITED POLITICAL ACTION COMMITTEE, an unincorporated association, DOCK MEEKS, DAVID DANTZLER, JOHN HICKS, III, individually and on behalf of all others similarly situated

v.

LUKENS STEEL COMPANY, and INTERNATIONAL STEELWORKERS OF AMERICA (AFL-CIO), and LOCAL 1165, UNITED STEELWORKERS OF AMERICA (AFL-CIO), and LOCAL 2295, UNITED STEELWORKERS OF AMERICA (AFL-CIO)

United Steelworkers of America, AFL-CIO-CLC, and its Local Unions 1165 and 2295, Appellants in 84-1478

Lukens Steel Company, Appellant in 84-1509

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civ. No. 73-1328)

Argued June 11, 1985

Before: WEIS, GARTH, and STAPLETON,
Circuit Judges

Filed November 13, 1985

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OPINION OF THE COURT

WEIS. *Circuit Judge.*

This appeal is from the grant of injunctive relief and liability findings in a wide-ranging employment discrimination class action. We conclude that : (1) the same period of limitations applies in § 1981 claims as in those under § 1983: (2) class representatives who were not discriminated against in initial work assignments may not represent those who were: (3) on remand. consideration should be given to appointment of an appropriate representative and possible reinstatement of findings: (4) the unions violated Title VII and § 1981 by failing to assert racial bias as grievances: (5) the limitations period for a Title VII charge against a union begins only after it is named in an EEOC proceeding and not on the date that a charge is brought against the employer alone in a state proceeding: (6) a finding of discrimination in denying incentive pay was clearly erroneous where the evidence demonstrates the action was taken solely on economic grounds: and (7) other findings of discrimination by the district court were not clearly erroneous. Accordingly. we affirm. reverse. and remand in part.

After a lengthy bench trial, the district judge found for plaintiffs on several counts alleging discrimination in employment, and therefore entered a remedial order, reserving assessment of damages for future proceedings. On the other counts, the court concluded that the evidence was inadequate to support the plaintiffs' claims and entered judgment for defendants. Defendants appeal the orders adverse to them.[1]

In 1973, class action plaintiffs filed this massive suit on behalf of current and past employees of the Lukens Steel Company, alleging violations of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. Plaintiffs sought both injunctive relief and damages.

Defendant Lukens is an independent steel producing company with its principal facility in Coatesville, Pennsylvania. Since 1966, its work force has ranged between approximately 4200 and 5300 employees; of these the hourly employees numbered between 2600 and 3900. From 1967 to 1978, the percentage of black employees in the hourly work force varied between 21.8 and 24.1. Lukens' hourly employees had been represented by Locals 1165 and 2295 of the United Steelworkers of America, and the unions are listed as defendants together with the company.

The district court observed that work at Lukens requires skills which are unique to its specialized products. With a few limited exceptions, the "majority of the Lukens hourly work force start from scratch, and are trained on the job." Partially as a consequence of the need for highly specific skills, the company has a general policy of promoting from within its workforce. The district court found that to some extent current

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1. The district court opinion is reported at Goodman v. Lukens Steel Co., 580 F. Supp. 1114 (E.D. Pa. 1984)

disparaties between white and black employees are a reflection of historical discrimination existing well before the statutory limitations period applicable in this lawsuit.

Plaintiffs developed their case by a combination of statistical and anecdotal evidence. After the compilation of an extensive record. the court found evidence of discriminatory practices by the company in the following categories:

1. Initial job assignments to higher paying craft jobs were skewed in favor of whites. Blacks also were assigned in higher percentages than whites to "pool" positions. which had seniority provisions inferior to those in the "subdivisions."

2. Evidence focusing on transfers to more desirable craft positions demonstrated that whites were favored over blacks by a substantial margin.

3. Incentive pay was denied to workers in the predominantly black crews in the Pit Subdivision. although it was given to other specialized crews composed mainly of whites.

4. Lukens discriminated against black workers by discharging a higher percentage of black employees during their probationary period.

5. The company discriminated against blacks in denying them promotion to salaried positions in management.

6. Lukens tolerated harassment of black employees by whites and failed to take appropriate steps to curb such behavior, thereby encouraging workers to believe such conduct would go unpunished.

The district court also determined that the unions were guilty of discriminatory practices in:

1. Failing to challenge discriminatory discharges of probationary employees.
2. Failing and refusing to assert instances of racial discrimination as grievances.
3. Tolerating and tacitly encouraging racial harassment.

The court further found that plaintiffs had failed to present adequate proof of discrimination in the following areas:

1. The seniority system.
2. Manning of the new Strand-cast facility (with the exception of class representative Ramon L. Middleton).
3. Shift assignments, including Sundays and holiday work, as well as overtime pay.
4. Discipline (excluding discrimination in discharge of probationary employees).
5. Awards for employee suggestions for improvement in plant operation.
6. Processing grievances by the unions insofar as the complaints centered on the number of grievances which the locals presented initially and pursued through arbitration. In addition, the lower rate of successful outcomes for black employees' grievances did not show racial discrimination.

The court also directed individual relief for class representatives Goodman, Winfield, Jones, Middleton, and Dantzler, but denied the individual claims of Dock L. Meeks, and John R. Hicks III.

The court issued orders against the company and the unions enjoining racial discrimination in the specific areas in which violations of Title VII and § 1981 had been found and directing certain remedial measures. Notice to class members was ordered, and a tentative trial date was set for the individual claims.

Both the company and the unions have appealed the various findings against them, challenging both legal and factual determinations made by the district court. Plaintiffs have not appealed the rulings on which they or the class were unsuccessful.

I.

THE STATUTE OF LIMITATIONS FOR SECTION 1981 CLAIMS

Because there is no specified federal statute of limitations applicable to § 1981 cases, the district court was required to use the state limitations period most analogous to the civil rights cause of action. *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975). In a Memorandum Opinion issued on June 16, 1975, the district court concluded that the appropriate period was the six years set forth in Pa. Stat. Ann. tit. 12, § 31, rather than the two year period "for injury wrongfully done to the person" as set out in Pa. Stat. Ann. tit. 12, § 34.

In this determination, the district judge anticipated our decision some two years later in *Meyers v. Pennypack Woods Home Ownership Ass'n.*, 559 F.2d 894 (3d Cir. 1977), where we applied the six year general statute of limitations in a housing discrimination case brought under sections 1981 and 1982. *See also Davis v. United States Steel Supply*, 581 F.2d 335 (3d Cir. 1978) (six year statute of limitations applicable to § 1981 employment discrimination claim).

Although the district judge was correct in forecasting that we would adopt a six year limitation period in an employment case, his prescience, like ours, was limited. Neither he, nor this court, foresaw the Supreme Court's ruling that all § 1983 cases should be governed by a uniform statute of limitations -- that provided by the states for personal injury. *Wilson v. Garcia*, 53 U.S.L.W. 4481 (Apr. 17, 1985). That ruling requires us to reexamine our earlier decisions on the appropriate statute of limitations in Civil Rights cases.

In *Polite v. Diehl*, 507 F.2d 119 (3d Cir. 1974) (*in banc*), we discarded the notion of applying a single limitations period to all § 1983 cases and chose instead to look to the relief sought and the particular injury alleged. A claim alleging bodily injury was governed by the two year Pennsylvania statute but one which was more akin to a contract action came under the six year limitation. Hence, under *Polite v. Diehl* differing statutes of limitations would be applied to a variety of claims in one suit.

Although the court discussed only the § 1983 claims, it noted that plaintiff did formulate causes of action under § 1981. 507 F.2d at 121, n.2. In any event, the *Polite* rationale of looking to the facts in each case and then searching out for the most analogous state statute was followed in § 1981 cases, as well as those brought under § 1983. *See Davis v. United States Steel*, 581 F.2d at 338, 341 n.8; *Meyers v. Pennypack Words Home Ownership Ass'n.*, 559 F.2d at 903 n.27.

We later determined that the six year statute of limitations applied in § 1983 claims of (1) sex discrimination in employment, *Knoll v. Springfield Township School Dist.*, 699 F.2d 137 (3d Cir. 1983), *vacated and remanded* 53 U.S.L.W. 4488 (Apr. 17, 1985), *on remand* 763 F.2d 584 (3d Cir. 1985); (2)

termination of employment without due process. *Perri v. Aytch*, 724 F.2d 362 (3d Cir. 1983); (3) discharge from employment in violation of the First Amendment. *Fitzgerald v. Larson*, 741 F.2d 32 (3d Cir. 1984); and (4) termination of employment contract for exercise of First Amendment rights. *Skehan v. Trustees of Bloomsburg State College*, 590 F.2d 470 (3d Cir. 1978).

Wilson v. Garcia completely undermined the rationale we employed in *Polite* as we were quick to recognize. *Smith v. City of Pittsburgh*, 764 F.2d 188 (3d Cir. 1985), reviewed our earlier decisions in light of *Wilson* and applied Pennsylvania's two year statute of limitations for personal injuries to a § 1983 claim of employment termination without due process. In view of the previous unsettled law in this and other circuits, in *Smith* we also determined that *Wilson v. Garcia* should be applied retroactively.

Had the case at hand been brought under § 1983 rather than § 1981, the statute of limitations question would be answered by *Wilson*. This case, however, involves discrimination in private employment to which § 1983 does not apply, and therefore the issue is whether the same statute of limitations used under § 1983 should also apply to § 1981.

The *Wilson v. Garcia* analysis begins with a reference to 42 U.S.C. § 1988, which determines the "rules of decision applicable to Civil Rights claims." Because no federal statute of limitations has been provided for such claims, § 1988 approves the use of state law to provide the appropriate rule. The reference to state law, however, occurs only after analysis of the claim using federal standards. In characterizing § 1983 claims for statute of limitations purposes, the court must consider the elements of the cause of action and Congress' purpose in providing it. *Wilson*, 53 U.S.L.W. at 4483.

In deciding the issue presented here, we find it most significant that § 1988 applies not only to § 1983 but to § 1981 and the other reconstruction Civil Rights Acts as well. Section 1988 by its terms applies to "the jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title 'Civil Rights,' and of Title 'Crimes,' for the protection of all persons in the United States in their civil rights."

In this context, we do not consider relevant that § 1981 was originally enacted in 1866, reenacted in 1870, and later included in the 1874 codification, while § 1983 was the subject of separate legislation in 1871. *See Runyon v. McCrary*, 427 U.S. 160, 168 n.8 (1976); *Mahone v. Waddle*, 564 F.2d 1018, 1030-31 (3d Cir. 1977). Both sections are to be analyzed under the broad provision of § 1988, which is "a directive to select, in each state, the one most appropriate statute of limitations." *Wilson*, 53 U.S.L.W. at 4485. In this choice, we should be guided by "federal interests in uniformity, certainty, and the minimization of unnecessary litigation" over the limitations period as well as by the nature of the federal Civil Rights remedy, and the prevention of potential state discrimination against it.

In concluding that state statutes for personal injury were the most appropriate for use in § 1983 cases, the Supreme Court believed that the enacting Congress viewed civil rights actions as analogous to state tort claims. In this connection, one might argue, as does the dissent, that since § 1981 on "its face relates primarily to racial discrimination in the making and enforcement of contracts," *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975), the state statute of limitations applying to suits for breach of contract is the most appropriate one. *See Wilson v. Sharon Steel Corp.*, 549 F.2d 276, 280 (3d Cir. 1977).

We are not persuaded by that argument because it does not recognize the broad sweep of § 1981, *see Mahone v. Waddle*, nor is it consistent with the fundamental reasons underlying *Wilson v. Garcia*. There, the Court emphasized § 1983's derivation from the Fourteenth Amendment, which recognizes the "equal status of every person;" that all persons shall be accorded the full privileges of citizenship; and that no person should be deprived of life, liberty or property "without due process." *Wilson*, 53 U.S.L.W. at 4485. As the Court said, "[a] violation of that command is an injury to the individual rights of the person." *Id.*

Those concepts apply equally to actions under § 1981. Present day § 1981's predecessor was founded on the Thirteenth Amendment that allows "neither slavery nor involuntary servitude" to exist any longer. It is difficult to imagine a more fundamental injury to the individual rights of the person than the evil that comes within the scope of that amendment. Also of significance is that in *Runyon v. McCrary*, the Supreme Court accepted the use of a state's personal injury statute of limitations in a § 1981 case. 427 U.S. at 180-82.

Moreover, in its reenactment of § 1981 in 1870, Congress looked to constitutional authority embodied in the Fourteenth, as well as in the Thirteenth Amendment. *Croker v. Boeing Company*, 662 F.2d 975, 987 (3d Cir. 1981) (*in banc*); *see also General Building Contractors Ass'n., Inc. v. Pennsylvania*, 458 U.S. 375 (1982). Consequently, much of the body of law developed under the Fourteenth Amendment is helpful in the interpretation of § 1981.

A substantial overlap exists in the types of claims brought under sections 1981 and 1983. A plaintiff may press an allegation of intentional racial discrimination under either section when state action is present. A § 1983 case of intentional racial discrimination in

employment filed in Pennsylvania against a state agency is governed by the two year personal injury statute. *See Knoll v. Springfield Township School Dist.*, 763 F.2d 584 (3d Cir. 1985). Application of Pennsylvania's six year statute of limitations where the same claim is brought under § 1981 would lead to a bizarre result.

Our first opinion in *Knoll*, 699 F.2d 137, 144, expressed our doubt that Congress would have intended a differing limitations period depending on whether the defendant was a state official sued under § 1983 or a private individual in a § 1981 action. The same conclusion is appropriate where the identical claim may be brought under either of these Reconstruction Civil Rights Acts. *See Jackson v. City of Bloomfield*, 731 F.2d 652 (10th Cir. 1984). Therefore, because employment discrimination cases under § 1983, regardless of their affinity to contractual actions, are now governed by the personal injury statute of limitations, and because the same considerations which led to that judgment are also present in § 1981 cases, we conclude that the same limitations period applies.[2]

In taking this position, we are in agreement with Supreme Court in *Wilson* that the personal injury limitation period is unlikely to be fixed in such a way as to discriminate against federal Civil Rights claims. In addition, the factors characterized as "practical considerations" by Justice O'Connor's dissent in *Wilson* -- which include the desirability of uniformity, certainty, and minimization of litigation prior to reaching the merits -- are best served by applying the

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2. We note that in 1978 and 1982 Pennsylvania's statute of limitations scheme was substantially revised. Claims for injury to economic rights, as well as for personal injuries, are currently subject to a two year limitation. 42 Pa. Cons. Stat. Ann. § 5524.

same statute of limitations to all of the Reconstruction Civil Rights cases.[3]

As we noted earlier, the reasoning employed by the Supreme Court in *Wilson* is inconsistent with the *Polite* approach as used in *Davis* and *Pennypack Words*. This court has consistently held that one panel may not overrule an earlier panel's decision. *See* Third Circuit Internal Operating Procedure VIII C. However, we have recognized that this principle must yield when a panel opinion is in conflict with an intervening Supreme Court precedent. "Where, however, a holding of this Court is overruled or rejected by the Supreme Court, IOP 8c does not require in banc consideration to align this court's jurisprudence with Supreme Court teaching. *Rubin v. Buckman*, 727 F.2d 71 (3d Cir. 1984) (Garth, J. concurring). *See also West v. Keve*, 721 F.2d 91, 93 (3d Cir. 1983); *Geraghty v. United States Parole Commission*, 719 F.2d 1199, 1209 (3d Cir. 1983). The rationale used in *Davis* cannot coexist with *Wilson*, and accordingly does not bind us here.

We hold, therefore, that the personal injury statute of limitations of the forum state supplies the most analogous statute of limitations for actions brought under § 1981. For the reasons set forth in *Smith v. City of Pittsburgh*, we also conclude that our decision should be given the customary retroactive effect. *See Fitzgerald v. Larson*, 769 F.2d 160 (3d Cir. 1985).

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3. The plaintiffs argue that under the rule we adopt in this opinion a statute meant to cover only cases involving bodily injury will be applied to actions in which no such injury is alleged. *See* Meyers v. Pennypack Woods, 559 F.2d at 902. The Supreme Court clearly foresaw the possibility that uniform characterization of all civil rights claims might lead to some seemingly anomalous results under a particular state statutory scheme. *See* Wilson v. Garcia, 53 U.S.L.W. at 4484. That state law interpretations are not fully consistent is an acceptable result when considered in light of the overriding federal interest in uniformity.

Our holding affects some but not all of the findings made by the district court. Plaintiffs contend that the two year statute of limitations would not change the district court's decree because it was based on violations of Title VII as well as § 1981.[4] However, because the court did not consider the facts separately under § 1981 and Title VII, we conclude this lack of discrete analysis requires a partial remand.

As noted in *Croker v. Boeing*, 662 F.2d 975 (3d Cir. 1981), § 1981 liability is not co-extensive with that under Title VII, and the remedies provided under the two statutes are "separate, distinct, and independent." *See Johnson v. Railway Express Agency*. In the absence of a specific finding fixing liability under each statute, we are unable to say whether application of the two year statute of limitations would result in a difference in the court's decree on two of its liability determinations. It is conceivable, for example, that events within the six year statute of limitations used for the § 1981 claims might have been considered by the court in finding liability under Title VII beyond its limitations period.

In finding discrimination in transfers to salaried positions, the district court relied heavily on the low percentage of blacks promoted to foreman jobs in the years 1969 and 1970 -- between three and four years before the suit was filed. The court found that the evidence "overwhelmingly establishes that Lukens discriminated in the selection of foremen until at least 1971." 580 F.Supp. at 1145. For the years 1971

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4. The district court determined that as to the claims against the company, the Title VII limitations period began on May 6, 1970, and that finding has not been challenged on appeal. Evidence of disparate treatment under Title VII provides the elements of intentional discrimination under § 1981. *See* Lewis v. University of Pittsburgh, 725 F.2d 910, 915 n.5 (3d Cir. 1983).

through 1978. however. approximately 26% of the foreman promotions were given to blacks -- not substantially different from their 29% representation in the work force during those years.

The record contains other anecdotal and statistical evidence on this point which should be evaluated by the district judge in the first instance. We are mindful that a finding of classwide violation is supported only when the evidence shows that discrimination was the company's standard operating procedure. rather than something which occurred only in a few isolated incidents. *See International Bhd. of Teamsters v. United States*. 431 U.S. 324 (1977). In such a situation. the trial judge's appraisal is particularly important.

Similarly. the district court's finding that the company tolerated racial harassment within the work force must be reevaluated on remand. The court stated that it had considered more than 100 incidents or practices. many of which "predated the limitation period" and about 35 of which "occurred within the limitations period or shortly before -- e.g. 'in the late 1960s' or 'between 1965 and 1970'." 580 F. Supp. at 1147. The court recognized the critical inquiry as "assessing the conditions which prevailed during the limitations period." *Id.*

Some of the instances described in detail by the district judge occurred before 1971 and some thereafter. We are unable to determine from the record what effect the application of the two year statute of limitations for the § 1981 claims would have on the district court's conclusion with respect to the harassment charge. Consequently. it too will require reexamination by the trial court.

We have surveyed the findings on the other issues and conclude that they would not be affected by the two year limitations period. Naturally. in the portion of the

case remaining to be tried for assessment of individual damages, the two year statute would apply.

II.

CLASS CERTIFICATION AND CLASS REPRESENTATIVES

A.

A second major issue presented in this case is that of class representation. In this area, too, subsequent decisional law requires review of the district court's ruling in a somewhat different light than that which prevailed at the time the court acted.

In a Memorandum of June 16, 1975, the district court certified a class of "all black persons employed by the defendant Lukens Steel Company at any time on or after June 14, 1967." This class includes persons whose employment was within the six year statute of limitations for § 1981 applied by the district court. To that extent, the class definition must be narrowed.

A review of the class allegations in the complaint and the court's certification order shows that the suit was conceived as a broad, "across the board" attack on racial discrimination at Lukens. As class representatives, the court approved Charles Goodman, Ramon L. Middleton, Romulus C. Jones, Jr., Lymas L. Winfield, Dock Meeks, David Dantzler, and John R. Hicks, III. Each of these plaintiffs asserted specific claims of discrimination practiced against them by the company and, in several instances, by the unions as well.

Because of the nature of the claims, the court concluded that any ruling on the appropriateness of damages was premature, and therefore certified the class under Fed. R. Civ. P. 23(b)(2). *See Kyriazi v. Western Electric Co.*, 647 F.2d 388 (3d Cir. 1981). Possible definition of a class under Rule 23(b)(3) for

assessment of damages was reserved. After making its liability determinations, the court directed counsel to prepare a proposed form of notice to class members.

On appeal, defendants contend that the district court erred in allowing the individual plaintiffs who asserted injury from specific discriminatory practices to represent a broad class alleging violations beyond those of the named individuals.

Initially, we observe that contrary to the defendants' contentions, the issue here is one of compliance with the provisions of Rule 23, not one of Article III standing. Each of the named plaintiffs has presented claims of injury to himself and has alleged facts which present a case or controversy under the Constitution. *Cf. O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) ("If none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class.").

The thrust of the defendants' challenge is that the injuries to the named plaintiffs are in many instances not the same as those advanced on behalf of the class. In essence, the defendants contend that the allegations of the named plaintiffs do not present "questions of law or fact common to the class" and that their "claims . . . are [not] typical of the claims . . . of the class" as required by Rule 23(a)(2) and (3). For this reason, we need only consider whether the named plaintiffs meet the requirements of Rule 23.

The expansive "across the board" class action attack on employment discrimination gained currency in a series of cases typified by *Johnson v. Georgia Highway Exp. Inc.*, 417 F.2d 1122 (5th Cir. 1969), and *Payne v. Travenol Lab., Inc.*, 565 F.2d 895 (5th Cir. 1978). *See also Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239 (3d Cir. 1975); *Mack v. General Elec. Co.*,

329 F. Supp. 72 (E.D. Pa. 1971); Rutherglen, *Title VII Class Actions*, 47 U. Chi. L. Rev. 688 (1980). In *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982), however, the Supreme Court pulled in the reins by insisting on actual, not presumed, compliance with the typicality and commonality provisions of Rule 23.

The Supreme Court pointed out that a named plaintiff's proof of his personal claim would not necessarily establish that the discriminatory practice was pervasive or was reflected in other employment activities. As the Court said, "[i]f one allegation of specific discriminatory treatment were sufficient to support an across-the-board attack, every Title VII case would be a potential companywide class action. We find nothing in the statute to indicate that Congress intended to authorize such a wholesale expansion of class-action litigation." *Id.* at 159.

In *Falcon*, the named plaintiff alleged that he had been denied a promotion because he was a Mexican-American. The Court determined that he could not represent a class of Mexican-Americans attacking discrimination in hiring. The Court cited *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977), in which named plaintiffs who were not qualified as over-the-road drivers could not represent a class of qualified drivers who complained of discrimination. Because the named plaintiffs "could have suffered no injury as a result of the alleged discriminatory practices, . . . they were, therefore, simply not eligible to represent a class of persons who did allegedly suffer injury." 431 U.S. at 403-04.

Scott v. University of Delaware, 601 F.2d 76 (3d Cir. 1979), presented a similar problem. There, a former faculty member whose contract was not renewed alleged that he was a victim of racial discrimination and sued under sections 1981 and

1983 as well as Title VII. He sought to represent a subclass of applicants seeking initial faculty appointments who were also allegedly victimized by racial considerations. The district court entered judgment on the merits for the defendant on both the individual and class claims.

We determined that the plaintiff could not represent a class contesting the university's hiring procedures. Clearly, he had suffered no harm from discrimination in hiring practices since he had initially obtained a position. In that situation, absent class members might be harmed by the preclusive effect of the district court's judgment. Therefore, we concluded that the court had a duty to "consider carefully the requirement of fair and adequate protection" to the absent class members, despite the lack of a cross appeal of the class certification ruling by the defendant. *Scott*, 601 F.2d at 83.[5]

As is clear from *Scott*, assessment of the adequacy of representation initially must focus on any potential conflicts of interest between the named individuals and the class. On this record, we find no divergence that would impair the incentive of the named plaintiffs in vigorously prosecuting all aspects of the claims that are otherwise found to be adequately represented. *Scott v. University of Delaware*, 601 F.2d at 85. *See* Rutherglen, *Notice, Scope, and Preclusion in Title VII Class Actions*, 69 Va. L. Rev. 11 (1983).[6] The defendants have raised additional allegations of error

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5. The defendant in *Scott* did challenge the propriety of the class certification in both the district court and on appeal.

6. The fact that some of the named plaintiffs did not prevail on their individual claims does not make them inadequate class representatives. *See* East Texas Motor Freight v. Rodriguez, 431 U.S. at 406 n.12 (1977); International Woodworkers of America v. Chesapeake Bay Plywood Corp., 659 F.2d 1259 (4th Cir. 1981).

in class certification, however, which must also be addressed.

The class representatives alleged a variety of instances of discrimination by the company and the unions in various employment practices, covering most of the claims presented by the class. Included were promotion (Middleton, Winfield, Jones), incentive pay (Meeks), discharge (Goodman, Hicks, Dantzler), harassment (Meeks), inadequate union representation (Middleton, Dantzler, Meeks), testing (Meeks), seniority system (Meeks), discipline (Dantzler), and manning of the new Strand-Cast facility (Middleton).

Defendants contend that in a number of areas the class representatives' specific allegations are distinct from those of the class as a whole. For example, none of the named plaintiffs were discharged during the probationary period. Nonetheless, some do allege that racial bias resulted in their discharge. Even though the alleged discrimination occurred after their probationary period had passed, we conclude that the typicality of their claims makes them adequate representatives under Rule 23.

The defendants' contentions are not completely without merit however. Even under an expansive view of representation, discrete areas of alleged bias exist in which the record does not demonstrate the required commonality and typicality of the class complaints with those of the individual representatives. A footnote in *Falcon* suggests that "[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify" a broad class if the bias manifested itself "in the same general fashion, such as through entirely subjective decisionmaking processes." 457 U.S. at 159 n.15. We do not regard the case at hand as meeting those requirements. The findings of the district court, which

rejected some of the plaintiffs' claims, belie the existence of a "general policy" of discrimination and plaintiffs did not produce "significant proof" of such a scheme.

The district court found discrimination in the initial assignment of Lukens' newly-hired employees. To be actionable, the discriminatory practice must exist during the applicable limitations period. All of the named plaintiffs, however, were originally hired outside the limitations period, and therefore, none have a viable complaint about discrimination in initial assignment. Thus, no representative adequately represents the class in this particular claim. *See Hill v. AT&T Technologies, Inc.*, 731 F.2d 175 (4th Cir. 1984).[7]

Because in this instance a qualified class representatives is lacking, the findings applicable to it must be vacated. Economical use of judicial resources, however, requires that some thought be given to whether the work of district court and counsel with respect to this claim may yet be salvaged.

B.

We begin by acknowledging the realities of class suits, a sometimes neglected approach in this field. In a massive class action such as the one at hand, it is counsel for the class who has the laboring oar. The class representatives furnish the factual basis to invoke the jurisdiction of the court and provide the outline of the controversy, but the lawyers shape the

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7. Nor do we find appropriate class representatives for one claim resolved in defendants' favor -- that in which discrimination in the awards for suggestions made to the company was alleged. That point has not been raised by defendants or plaintiffs, and we leave it for further exploration, if desired, in the district court.

claims for adjudication by the compliation of factual and expert testimony and the presentation of statistical and documentary evidence.

That work was performed in this case by thoroughly competent counsel as to the claims in which the court found for plaintiffs as well as those where it ruled for defendants. We do not prejudge the issue but merely note the distinct possibility that the evidence presented would not have varied one iota had a qualified representative for each claim been present from the inception of the suit. If that possibility is indeed the fact. then another suit filed on such a claim by a newly qualified class representative would produce a trial that would simply repeat the previous one. That result would yield no discernable benefit to anyone but would generate substantial loss in time for court. counsel. and parties.[8]

To obviate such unnecessary duplication. on remand the district court should explore the possibility of intervention by qualified class representatives. followed by a proceeding to determine if the findings previously reached may be reinstated. That solution was suggested by the Court of Appeals for the Fourth Circuit in *Hill v. Western Elec. Co., Inc.*, 672 F.2d 381 (4th Cir. 1982). *See* Note. *Reinstating Vacated Findings in Employment Discrimination Class Actions: Reconciling General Telephone Co. v. Falcon with Hill v. Western Electric Co.*, 1983 Duke L.J. 821.

Intervention is still permissible even at this stage. *see United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), and a class action determination in some instances may be made even after appeal. *McLaughlin*

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8. Such a suit would be timely since the commencement of the class action tolled the statute of limitations as to members of the class. *See* Crown. Cork & Seal Co., Inc. v. Parker. 462 U.S. 345 (1983): Edwards v. Boeing Vertol Co., 717 F.2d 761 (3d Cir. 1983).

v. Wohlgemuth, 535 F.2d 251, 252 n.2 (3d Cir. 1976).

As the *Hill* court observed, practical fairness should guide the district court in evaluating the propriety of intervention. For example, a witness who testified about a particular practice and who otherwise meets the necessary test may be a likely representative. *See Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326 (4th Cir. 1983). If, however, no proper class representative is available, then that claim must be dismissed as to the class. *See Scott v. City of Anniston, Alabama*, 682 F.2d 1353 (11th Cir. 1982); *Carpenter v. Stephen F. Austin State University*, 706 F.2d 608 (5th Cir. 1983). *Cf. Vuyanich v. Republic Nat'l Bank of Dallas*, 723 F.2d 1195 (5th Cir. 1984).

Assuming that a proper class representative is appointed, the next step would be to determine whether the findings from the original trial may be reinstated. In reaching a decision on this question, the district court must consider whether either side will be prejudiced. This will require determination of whether those findings would have been different had the new class representative been on board at that time. An intervenor or new class representative seeking to salvage the original findings has the burden of proving that the prior defect in class representation did not affect those determinations. In the event of such proof, the previous findings may be reinstated.

On remand, the district court has the benefit of hindsight. As the court of appeals said in the *Hill* case, "[t]o the extent inadequacy is based solely upon lack of sufficient identity of interest, any presumed adverse effect on the merits stemming from this may in fact be utterly belied by the outcome." 672 F.2d at 389. *See also Scott v. University of Delaware*, 601 F.2d at 87 n.22. If the results of the original trial were favorable to the class, then there may be no reason to assume that reinstatement would be prejudicial to the class.

The district court also has the responsibility of determining whether it would be unfair to defendants to reinstate the findings. That the net effect is to revive an adverse result is not in itself a sufficient showing of prejudice. Rather, the court should consider whether the defendants' preparation and tactics would have been different had other class representatives been in place at the earlier trial. In other words, the question is would defendants have conducted the litigation differently in some material way absent the defect in representation in the prior proceeding. *See Dickerson v. United States Steel Corp.*, 582 F.2d 827 (3d Cir. 1978). *Cf. Mullaney v. Anderson*, 342 U.S. 415, 417 (1952) (Joinder of new parties permissible where their earlier presence would not "have in any way affected the course of the litigation").

We do not limit the district court in its inquiry but only point to a few of the considerations that should be examined.

C.

Plaintiffs contend that the United Political Action Committee -- an unincorporated association composed predominantly of black citizens in the vicinity of the Lukens plant, some of whom are employed by the company -- should be permitted to act as a class representative. The record in this case does not contain adequate factual material to justify the committee's capacity to act as a class representative. *See General Telephone Co. of the Southwest v. Falcon.*

Accordingly, we conclude that on this record no named plaintiff could adequately represent the class in the claim of racial discrimination in initial work assignments. On remand, the district court may consider the intervention and appointment of appropriate class representatives as well as possible reinstatement of the original findings.

III.

CLAIMS AGAINST THE UNIONS

The district court concluded that the evidence did not support the plaintiffs' claims about racial discrimination in the general handling of grievances by the unions, including references to arbitration. The delay in processing grievances and the decision to abandon those of a less serious nature were, in the court's view, practices legitimately complained of by both black and white workers. However, the court did find that the unions discriminated against the plaintiff class in violation of both § 1981 and Title VII.

Collective bargaining agreements beginning in 1965 had prohibited the company from discriminating against any employee, probationary or permanent, on racial grounds. Nevertheless, although they knew that blacks were being discharged at a disproportionate rate during the probationary period, the locals failed to file grievances challenging that practice, pursuant to a union policy of not grieving complaints of probationary employees.[9]

The unions were reluctant to assert racial bias as a basis for a grievance even when they believed that element was implicated. The court found this policy to perpetuate the discriminatory environment and "render the non-discrimination clause in the collective bargaining agreement a dead letter." 580 F. Supp. at 1160.

The unions argued before the district court that simple inactivity could not make them liable under Title VII or § 1981. The district court rejected that contention, but went on to hold that "the evidence in this case proves far more than mere passivity on the part of the unions." The court further commented that

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9. We reject the unions' contention that the district court's findings were clearly erroneous as to this matter.

"[a] union which intentionally avoids asserting discrimination claims, either so as not to antagonize the employer and thus improve its chances of success on other issues, or in deference to the perceived desires of its white membership, is liable under both Title [VII] and § 1981 regardless of" its leadership's favorable disposition toward blacks. *Id.* at 1160.

On appeal, the unions repeat their argument that mere passivity should not subject them to liability because such inaction is not within the scope of § 703(c) of Title VII addressing union responsibility. That section of the Act provides in pertinent part that it is an unlawful employment practice for a union:

> "(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> • • •
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section."

42 U.S.C. § 2000e-2(c).

The union argues that passivity does not "cause" the employer to discriminate and faults *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973), for holding a union liable without any reference to the text of the statute. Although the *Macklin* case has been criticized, *see* Larson, *Employment Discrimination*, § 44.50, other cases have echoed its premise that there is an affirmative duty on the part of the unions to combat discrimination in the workplace. *See, e.g., Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297 (9th Cir. 1982); *Farmer v. ARA Services, Inc.*, 660 F.2d 1096 (6th Cir. 1981); *Romero v. Union Pacific R.R.*, 615 F.2d 1303 (10th Cir. 1980); *Donnell*

v. General Motors Corp., 576 F.2d 1292 (8th Cir. 1978); *Carey v. Greyhound Bus Co., Inc.*, 500 F.2d 1372 (5th Cir. 1974).

In *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), the plaintiffs contended that disproportionate discipline had been imposed on them because of their race. They alleged that the union "had acquiesced and/or joined in" the employer's discrimination. The Court did not accept the union's defense that in representing a number of employees it is sometimes necessary to compromise the grievance of one.

> "We reject the argument. The same reasons which prohibit an employer from discriminating on the basis of race among the culpable employees apply equally to the union; and whatever factors the mechanisms of compromise may legitimately take into account in mitigating discipline of some employees, under Title VII race may not be among them."

427 U.S. at 285.

The case against the unions here is stronger than one of mere acquiescence. The district court found that the unions intentionally avoided asserting claims of discrimination. In so doing, the unions violated the duty of fair representation owed to their members. *See Vaca v. Sipes*, 386 U.S. 171 (1967); *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944); *see also*, Note, *Union Liability for Employer Discrimination*, 93 Harv. L. Rev. 702 (1980).

By shirking their responsibility for presenting grievances based on discrimination, the unions also violated the duty to enforce the collective bargaining agreement. *See Peterson v. Lehigh Valley Dist. Council*, 676 F.2d 81 (3d Cir. 1982). The deliberate choice not to process grievances also violated

§ 703(c)(1) of Title VII because it discriminated against the victims who were entitled to representation. The district court's finding of intentional discrimination properly supports the claims under § 1981 as well. We therefore find no error in the district court's assessment of liability against the unions.

IV.

STATUTE OF LIMITATIONS AS TO THE TITLE VII CLAIMS AGAINST THE UNIONS

Plaintiff Hicks filed charges against Lukens before the Pennsylvania Human Rights Commission on December 2, 1971. The unions were not named in that complaint. On January 28, 1972, however, Hicks along with named plaintiffs Goodman, Meeks, and Middleton filed broad charges of discrimination against Lukens, the International Union, and Local 1165 with the EEOC. The Commission deferred these charges to the Pennsylvania Human Relations Commission on February 16, 1972, and filed them on May 7, 1972. Local 2295 was first named in an amended charge filed by plaintiff Meeks on June 13, 1972.

Because the statute allows the state agency sixty days to dispose of a claim, 42 U.S.C. § 2000e-5(c), the earliest that Hicks' original charge could be considered filed with the EEOC was January 31, 1972. Based on that date, the district court found that the limitation period for Title VII claims against the unions began on April 6, 1971. That determination is correct only if the initial filing in the state Commission against Lukens is construed to include claims against the unions as well.

In *Ostapowicz v. Johnson Bronze Co.*, 541 F.2d 394 (3d Cir. 1976), we held that the scope of a Title VII action is defined by the limits of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination. That case,

however, involved only one defendant, and we did not hold that the scope of the investigation could include unnamed parties.

Glus v. G.C. Murphy Co., 629 F.2d 248 (3d Cir. 1980), held that charges against an unnamed international union could be adjudicated because the original complaint before the EEOC had named a local union whose interests were the same and the international had received notice. Neither of those two conditions apply here. The charge filed by Hicks was not against a union, but against the employer. We do not find the commonality of interest and actual notice which would make *Glus* applicable. Therefore, no charges were cognizable against the unions until the January 28, 1972 filing with the EEOC.

In *Mohasco Corp. v. Silver*, 447 U.S. 807, 814 n.16 (1980), the Court held that "a complainant in a deferral State [as is Pennsylvania] . . . need only file his charge within 240 days of the alleged discriminatory employment practice in order to insure that his federal rights will be preserved." Plaintiffs ask that they be given the benefit of this 240 day rule. That would produce a limitations period commencing June 2, 1971, somewhat longer than that advocated by the unions. Although we can foresee another case in which a plaintiff might be entitled to a longer period, in light of the plaintiffs' concession here, we conclude that the June 2 starting date is appropriate.

We do not find a different limitation period applicable to Local 2295. The identity of interest and notice provisions of *Glus* are applicable in this situation; therefore, Local 2295 will be governed by the same effective limitations date, June 2, 1971.

The correction of the limitations date for Title VII claims against the unions will not affect the injunctive relief directed by the district court. It might, however,

make a difference in the assessment of damages, and accordingly we feel obligated to make a ruling on the point.

V

INCENTIVE PAY FOR THE PIT CREWS

The district court found that the company's policy of denying incentive pay to workers in the open hearth pits while making it available to other workers amounted to discrimination. The open hearth pit crews were predominantly black. Their assignment was to prepare molds to receive molten metal, pour the metal, and remove the molds after the metal had hardened. At a higher physical elevation in the plant, workers on the melting "floor" placed the raw materials into the furnaces for melting and supervised that process. These predominantly white crews received incentive pay, as did other workers in the Lukens facility.

The court reasoned that "[g]iven the fact that the company paid incentive bonuses to the 'floor' personnel, . . . [its] refusal to accord the same benefit to the pit personnel had no legitimate justification. I find that this was a clear instance of racial discrimination." 580 F. Supp. at 1138.

In reviewing factual findings made by a district court, we apply the clearly erroneous standard set out in Fed. R. Civ. P. 52(a). As the Supreme Court stated in *Anderson v. City of Bessemer City*, 53 U.S.L.W. 4314 (March 19, 1985), this standard is used "even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." *Id.* at 4317. The Rule clearly requires deference to the findings of the trial judge, but it does not relieve the court of appeals from its responsibility to correct findings of fact when it is left "with a definite and firm

conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

As an appellate court, we have an advantage over the trial judge in that the parties have had ample opportunity after trial to review the record in detail and point out specific references to support their position. Moreover, the attention of the litigants is restricted to a narrow area in which they hope the challenge may be successful. That process differs from the broad gauge approach which is followed in the district court, where the requests for findings are being compiled in the first instance from voluminous testimony and exhibits and without any indication of the trial court's ultimate rulings. This is particularly true in a case as massive as this one.

After a painstaking review of every record reference to which the parties have cited us, we have come to the conclusion that in this instance, a mistake was made.

It is undisputed that the incentive pay issue was one of long standing which began before the limitations period. Both testimony and documents disclose that the union on a number of occasions had asked the company to grant incentive pay to the pit crew. The employer's response was consistent -- it would include the pit crew in the incentive plan only if the company was given the opportunity to reduce the size of the crew. On each occasion, and there were several, when the employer submitted this proposition to the members of the pit crew, they rejected it. Not only did the pit crews turn down the company's proposal, but the crane crews in the pit -- another seniority subdivision -- did so as well.

One union official who discussed the company's proposal with the workers recalled that about equal numbers of black and white workers were present at a meeting to vote on the proposal. Although plaintiffs

suggest that other groups receiving incentive pay also had agreements on crew size, testimony reveals that these arrangements were not comparable to those with the pit and crane crews.

Another union witness described the particularly close relationship among the workers in the pit crew. The men consistently presented a united front to the company and were most solicitous of each member's safety and well being. When one reads the testimony against this background, it is understandable why the pit crew would not sacrifice the jobs of its members in exchange for higher pay for those who would retain their positions.

The evidence is equally clear why the employer insisted on the trade-off. Company officials testified that the pit crews were overmanned and that the facilities of the plant were limited. Any increase in efficiency had to come from a reduction in crew size. In these circumstances, incentive pay would not be economically advantageous to the company because the capacity of the facility had already been reached and increased efficiency by the already overabundant manpower could not result in greater production.

The testimony does not support any inference that denial of incentive pay was racially inspired. The company's position on a trade-off was consistently maintained and was unrelated to race. That conclusion finds reinforcement in the company's experience with the die shop workers. Early collective bargaining agreements showed that both the pit crew and die shop group were not included in the incentive pay plan. However, when the die shop employees agreed that the company would be under no restriction as to crew size, they did receive incentive pay.

The record citations to which plaintiffs have referred us do not furnish any basis for concluding

that the company's reason for denying incentive pay was pretextual. Indeed, the weakness on this point in the otherwise vigorous and well-documented plaintiffs' brief is eloquent in itself.

After our review, we conclude that the finding on incentive pay to the pit crews is clearly erroneous, and on this claim, the judgment of the district court must be reversed.

VI.

LUKENS OTHER CONTENTIONS

In addition to the matters which have been discussed above, Lukens has raised other claims of error. It contends that the trial judge erred by impermissibly shifting the burden of proof to the defendant. We find no merit to this argument. In the introduction to his opinion, the trial judge reviewed the leading cases of *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). He stated clearly that the burden of proof was on plaintiffs. We are not persuaded that the casual references in the opinion to which Lukens points should be interpreted as contradicting the earlier unambiguous allocation of the burden of proof.

The court's opinion similarly displayed a thorough understanding of the difference between disparate impact and disparate treatment cases and of the relevant evidence under each theory. The defendant takes exception to the district judge's comment that

> "One must be careful not to over-categorize in this context. The analytical distinctions . . . are of only limited utility. The ultimate questions to be answered are essentially the same in all employment discrimination cases: Has the defendant caused a given employee or group of

> employees to be discriminated against? . . . Is the action or conduct complained of justifiable . . .?"

580 F. Supp. at 1121.

We find no fault with these observations. In *Dillon v. Coles*, 746 F.2d 998 (3d Cir. 1984), we similarly commented on excessive preoccupation with the various formulae used in an employment discrimination case and observed that they are simply tools designed to aid in the analysis of evidence. The ultimate question remains whether the defendant has discriminated. The presumptions and shifting burdens are merely an aid -- not ends in themselves. When direct evidence is available, problems of proof are no different than in other civil cases. *See Trans World Airlines, inc. v. Thurston*, ___ U.S. ___, 105 S.Ct. 613, 622 (1985); *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). If judges lose sight of the ultimate question, the analysis intended to aid in the process will instead have become a hinderance.

Lukens also argues that the district court misapplied evidence by failing to recognize that a statistical variation in itself does not establish discrimination unless the record also shows the requisite availability of positions and the qualification of the claimants. We do not so read the district court's opinion. In considering the statistical data presented as part of the plaintiffs' case, the court demonstrated its recognition of the limits of such evidence and the caution with which it must be viewed. The court noted that to prevail the class was required to prove that "disparate treatment exists and is the defendant's regular and standard operating procedure." 580 F. Supp. at 1120. In another part of the opinion, the court made clear that it had considered Lukens'

"attempts to show that [the plaintiffs'] comparisons are faulty because of factual dissimilarities." *Id.*

We repeat once again that the clearly erroneous rule applies to our review of factual findings, including those based in part on statistical data. Statistical proof in Title VII cases must be evaluated in light of the "surrounding facts and circumstances." *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 (1977). In *Dothard v. Rawlinson*, 433 U.S. 321, 338 (1977), Justice Rehnquist in his concurring opinion wrote, "[i]t is for the District Court, in the first instance, to determine whether these statistics appear sufficiently probative of the ultimate fact in issue. . . . In making this determination, such statistics are to be considered in light of all other relevant facts and circumstances." *See also Holsey v. Armour & Co.*, 743 F.2d 199, 215 (4th Cir. 1984).

We have reviewed Lukens' remaining contentions using this standard. We cannot say that the findings made by the district court are clearly erroneous, nor do we find error in the legal guidelines used by the court in reaching these remaining findings. Therefore, the judgment of the district court with respect to the instances of discrimination not previously discussed will be affirmed.

VII.

SUMMARY

1. The district court's findings that Lukens discriminated in transfers to salary positions and toleration of racial harassment will be vacated and the matters remanded for further consideration in light of our ruling on the appropriate statute of limitations for the § 1981 claims.

2. The district court's finding in favor of the class with respect to initial assignments will be vacated and

remanded for reconsideration in light of our ruling on class representation.

3. The limitations period pertaining to the Title VII claims against the unions shall be adjusted in accordance with the views expressed above.

4. The finding of discrimination in the denial of incentive pay for the pit crews is reversed and judgment shall be entered for the defendant on that claim.

5. In all other respects, the judgment of the district court will be affirmed.

GARTH, *Circuit Judge*, dissenting:

I agree with the majority's analysis and disposition of all the issues presented in this appeal except for one. I respectfully dissent from the majority's holding that the statute of limitations for a cause of action under 42 U.S.C. § 1981 is limited in Pennsylvania to two years rather than the six year period applied by the district court.

The court today relies on *Wilson v. Garcia*, 105 S. Ct. 1938 (1985), in which the Supreme Court held that all claims under § 1983 should be subject to a state's corresponding personal injury statute of limitations. Although *Wilson* does not address § 1981 claims, the court concludes that *Wilson*'s reasoning compels identical limitations treatment for all reconstruction Civil Rights claims. This conclusion is inconsistent with history, precedent, and logic, and in any event is not required by *Wilson*.

While the majority's holding may not bar the civil rights claims asserted in this case, since violations of § 1981 may be found to have occurred within the shorter limitation period, the majority's discussion

and holding necessarily will have ramifications far beyond the appeal which we decide today. I therefore write separately to record my disagreement with the majority's analysis.

I.

Prior to *Wilson v. Garcia*, this court applied a case-by-case analysis in determining which statute of limitations was most appropriate for a particular civil rights cause of action. *Polite v. Diehl*, 507 F.2d 119 (3d Cir. 1974) (in banc). Under this analysis, we have generally held that claims under § 1981 are governed in Pennsylvania by that state's six-year statute of limitations. *See, e.g., Davis v. United States Steel Supply*, 581 F.2d 335, 341 (3d Cir. 1978), *cert. denied*, 460 U.S. 1014 (1983); *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894, 902-03 (3d Cir. 1977).

In *Davis*, we held that a § 1981 claim of racial discrimination in employment, the gravamen of which was interference with economic rights and interests rather than personal injury, should be governed by Pennsylvania's six-year limitations period. 42 Pa. Cons. Stat. Ann. § 5527 (Purdon 1982). Unless it has been overruled by *Wilson*, *Davis* would appear to control the present case, where the gist of the cause of action is economic rather than bodily injury caused by interference with the employment rights of black workers.

Wilson holds that "the federal interests in uniformity, certainty, and the minimization of unnecessary litigation" requires that all § 1983 claims be governed by the same statute of limitations in a given state: that state's personal injury statute. 105 S. Ct. at 1947. Because *Wilson* looks to § 1988 for its authority to apply state limitations periods in civil rights actions, and § 1988 by its terms covers all of the

Reconstruction sections, the majority today concludes that *Wilson* mandates that all civil rights actions be governed by a state's personal injury limitation period. This conclusion is at best an arguable extension of *Wilson*'s analysis: it is by no means the holding of *Wilson* or an inexorable outgrowth of the case. In the absence of a square holding which overrules Third Circuit precedent, however, we remain bound by *Davis* to apply the six-year limitation period. It is not enough if *Wilson* merely undermines or raises questions about our prior analysis. Until the Supreme Court actually decides the limitation period for a § 1981 claim, or unless *Wilson* would admit of no other reasonable reading, only an in banc decision of this court can overrule *Davis*. *See* Third Circuit Internal Operating Procedures VIII C.[1]

A close reading of *Wilson* reveals that the majority's view is neither an inevitable nor even the most plausible reading of the case. *Wilson*'s holding that all § 1983 claims should be decided in a given state under the same statute of limitations follows from the Supreme Court's view that § 1983 claims are best analogized to state tort actions for personal injuries. *Id.* at 1947. Having made this analogy as a matter of federal law, the Court adopted New Mexico's three-year personal injury statute of limitations out of deference to the state's judgment regarding "the proper balance between policies of repose and the substantive policies of enforcement embodied in the state cause of action." *Id.* at 1945.

Nothing in *Wilson* addresses § 1981, which has a different history and purpose. *See* Section II infra. If

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1. *Compare* Rubin v. Buckman, 727 F.2d 71, 73-74 (3d Cir. 1984) (Garth, J., concurring) (in banc hearing not necessary to overrule prior panel when earlier case violated "consistent and explicit" rule and was "obviously in conflict with Supreme Court precedent.").

Wilson has any effect on this case, therefore, it is merely to suggest that a single, uniform statute of limitations should be applied in each state to all cases under § 1981 instead of the case-by-case approach of *Polite*. Whether that would be the two-year personal injury period now applied in Pennsylvania for § 1983 claims, *Smith v. City of Pittsburgh*, 764 F.2d 188 (3d Cir. 1985), or some other limitation period dictated by the nature of § 1981, is a question beyond the scope of *Wilson*. Even if *Wilson* does require us to select a single statute of limitations for all § 1981 claims, it does not necessarily erase the distinctions between § 1981 and § 1983 recognized in *Davis* and *Meyer*.[2] These cases would therefore weigh heavily toward our selection of six years as the most appropriate uniform period of limitations for § 1981 claims. In short, not only does *Wilson* not require today's result, but it can plausibly be read as support for a uniform six-year statute of limitations for § 1981 claims in Pennsylvania.

II.

An examination of the history, purpose, and application of § 1981 in contrast to the history, purpose, and application of § 1983, supports the conclusion that Pennsylvania's six-year statute of limitations for contract and trespass actions is the most appropriate one to apply to the § 1981 claim before us. While it is true, as the majority notes, that both § 1981 and § 1983 are concerned broadly with

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2. While *Smith v. City of Pittsburgh*, 764 F.2d 188 (3d Cir. 1985), discusses *Davis v. United States Steel Supply*, 581 F.2d 335 (3d Cir. 1978), *cert. denied*, 460 U.S. 1014 (1983), in following *Wilson v. Garcia*, 105 S. Ct. 1938 (1985), *Smith* was a § 1983 case. The *Smith* court erroneously cited *Davis* as a § 1983 case decided under the discredited case-by-case approach of *Polite*, 1764 F.2d at 193. In fact, *Davis* was a § 1981 case, and as such, is not controlled either by *Smith* or *Wilson*.

protecting the equal legal status of every person before the law, and that there is substantial overlap in the cases that may properly be brought under the two sections, there are still significant differences between the two. In short, § 1983 was conceived, and has been generally applied, as a personal injury statute. Section 1981, however, is more fundamentally concerned with injury to the contractual or economic rights of minorities, and as such should appropriately be governed by the longer contract statute of limitations.

A.

42 U.S.C. § 1981 was originally enacted as section one of the Civil Rights Act of 1866, was re-enacted as Section 16 of the 1870 Act, and was later included in the 1874 recodification. *Runyon v. McCrary*, 427 U.S. 160, 169 n.8 (1976). In its present form it provides:

> **§ 1981. Equal rights under the law**
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

While the "full and equal benefit" and "penalties" clauses give § 1981 broad applicability beyond the mere right to contract, *Mahone v. Waddle*, 564 F.2d 1018, 1028 (3d Cir. 1977), *cert. denied sub. nom., City of Pittsburgh v. Mahone*, 438 U.S. 904 (1978), speeches and testimony at the time of § 1981's enactment, demonstrate the predominantly economic focus of Section 1 of the 1866 Act.

Concerned with removing the badges and incidents of slavery, the legislators of 1866 believed that if economic freedom was protected, social freedom and equality would follow. Senator Trumbull, who introduced the 1866 Act, specified certain "great fundamental rights" denied to freedmen by former slave states:

> the right to acquire property, the right to come and go at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property.

Cong. Globe, 39th Cong., 1st Sess. 475 (1866), quoted in *Jones v. Alfred E. Mayer Co.*, 392 U.S. 409, 432 (1968).

The bills' supporters believed that freedom would be valueless to men not assured an equal opportunity to bargain for their labors. Illustrative of this economic concern are the words of Rep. Lawrence of Ohio delivered in a detailed speech to the House:

> It is idle to say a citizen shall have the right to life, yet deny him the right to labor, whereby he alone can live. It is a mockery to say a citizen may have a right to live, and yet deny him the right to make a contract to secure the privilege and the rewards of labor.
>
> Every citizen, therefore, has the absolute right to life, the right to personal security, personal liberty, and the right to acquire and enjoy property. These are rights of citizenship. As necessary incidents of these absolute rights, there are others, as the right to make and enforce contracts, to purchase, hold, and enjoy property, and to share the benefit of laws for the security of person and property.

Cong. Globe, 39th Cong., 1st Sess. 1832.

On March 2, Rep. Windom of Minnesota stated his understanding of the scope of the bill:

> Its object is to secure to a poor weak class of laborers the right to make contracts for their labor, the power to enforce the payment of their wages, and the means of holding and enjoying the proceeds of their toil.

Id. at 1159.

In 1865, the President commissioned Brigadier General Carl Schurz to tour the five most war-ravaged states to report on conditions there and suggest measures to overcome post war problems. In Report of C. Schurz, S. Exec. Doc. No. 2, 39th Cong., 1st Sess. at 21 (1865), Schurz concluded:

> It is, indeed, not probable that a general attempt will be made to restore slavery in its old form, on account of the barriers which such an attempt will find in its way; but there are systems intermediate between slavery as it formerly existed in the south, and free labor as it exists in the north, but more nearly related to the former than to the latter, the introduction of which will be attempted.

This intermediate state between slavery and free labor referred to by General Schurz was created in large part by the Black Codes enacted by Southern states. While specifying that blacks had the right to buy, sell, own and bequeath real and personal property, the right to contract, to sue and be sued, and to testify in court, these rights only related to blacks' relationships with other blacks. The Codes authorized unequal punishment for freedmen's offenses, restricted travel and residence, and established an etiquette of deference to whites. In addition, the Codes severely limited economic rights. Blacks were forbidden the

pursuit of certain occupations. They were subject to various master-servant statutes, vagrancy and pauper provisions that incorporated enforced labor, apprenticeship regulations, and elaborate labor contract statutes, especially pertaining to farm labor. Hyman & Wiecek, *Equal Justice Under the Law* 319-320 (1982).

It was within this historical context that the Act of 1866 and the vetoed Freedmen's Bureau Amendment were proposed. The perception of Civil Rights in the 19th century, while encompassing personal safety, was cast largely in economic terms by the definition of legal relationships, responsibilities, and remedies. It is evident, therefore, that § 1981 derived from an Act that was designed to ensure predominantly economic rights for newly freed blacks.

Moreover, 42 U.S.C. § 1982, which is recognized as a companion to § 1981, is by its plain language solely addressed to economic concerns. It reads:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Reading the two sections in conjunction, the 1866 Congress intended to end all discrimination and guarantee all citizens the opportunity to participate in the free market economy. Citizens were now free to make and enforce contracts for personal services and real and personal property. From their wording and identical legislative history, the two sections have been construed similarly. Both § 1981 and § 1982 reach private conduct. *Runyan*, 427 U.S. at 170. *See Johnson v. Railway Express*, 421 U.S. 454, 460 (1975); *Tillman v. Wheaton-Haven Recreation Assoc.*, 410 U.S. 431, 439-440 (1972). Both § 1981 and § 1982 are directed at the same kind of discrimination: racial

animus. *Jones*. 392 U.S. at 426. Both sections share a similar purpose. ensuring predominantly economic rights. and have been given similar construction. *See Meyers v. Pennypack Home Owners Assoc.*. 559 F.2d 894 (3d Cir. 1979). Therefore. both sections most appropriately belong under a state statute of limitations governing economic and contract actions.

B.

Section 1983. in contrast. reveals a very different legislative history. purpose. and application from § 1981 and § 1982. Section 1983 was enacted by Congress pursuant to § 5 of the fourteenth amendment in order to enforce that amendment. *Monroe v. Pape*. 365 U.S. 167. 171 (1961).

42 U.S.C. § 1983 in its revised form reads:

> Every person who. under color of any statute. ordinance. regulation. custom. or usage. of any State or Territory. subjects. or causes to be subjected. any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights. privileges. or immunities secured by the Constitution and laws. shall be liable to the party injured in an action at law. suit in equity. or other proper proceeding for redress.

Section 1983 was enacted as section 1 of the Civil Rights Act of 1871. *Adicks v. Kress*. 398 U.S. 144. 162 (1969). It arose from and was designed to respond to an entirely different set of circumstances than those which led to the original enactment of what became § 1981. As I have previously observed in discussing § 1981. the 1866 Congress was concerned with granting freedom and equality through economic guarantees which had long been denied the now newly freed blacks. It was economic freedom which enabled a man to be free. The focus was to identify those rights.

previously denied, that would enable a person to sustain himself and his family once the mechanism of the master-slave society was dismantled. These concerns stand in sharp contrast to concerns about violence, physical injury and lawlessness that motivated the Congress of 1871.

After the passage of the thirteenth amendment and the 1866 Act, Southern resistance to Reconstruction mounted. Ku Klux Klan activity and atrocities increased. White vigilantes were described as having whipped, robbed, and murdered blacks. On March 3, 1871, President Grant, declaring that anarchy reigned in the South and that the states were powerless to control widespread violence, requested emergency legislation. In order to suppress the Klan and provide civil rights protection against official inaction and toleration of private lawlessness, Congress passed the Ku Klux Klan Act, which became known as the Civil Rights Act of 1871. *See Brisco v. LaHue*, 460 U.S. 325, 340 (1983).

In characterizing all § 1983 claims as personal injury actions for limitations purposes, the Supreme Court looked to "the historical catalyst for the 1871 Act, the campaign of violence and deception in the south fomented by the Ku Klux Klan." *Wilson v. Garcia*, 105 S. Ct. 1938, 1947 (1985). "The atrocities that concerned Congress in 1871 plainly sounded in tort . . . ." *Id.* at 1948. In characterizing claims under § 1981, we should follow the Supreme Court's analysis and look to the very different underlying purpose and historical catalyst for the Act of 1866.

C.

In addition to their contrasting histories and purposes, § 1981 and § 1983 have been applied differently. Section 1983 encompasses a broad range of actions sounding in tort, including injuries under

color of state law to a person or his property and infringements of individual liberties. *Id.* at 1948. Cases under § 1983 "often involve elements that are similar to state causes of action for personal injury." *Jones v. United Gas Improvement Corp.*, 383 F. Supp. 420, 431 (E.D. Pa. 1974). *See also Harris v. Commonwealth*, 419 F. Supp. 10, 14 (M.D. Pa. 1976).

By contrast, the vast majority of cases brought under § 1981 arise out of some economic relationship consisting of more patterned sorts of behavior, frequently involving documentary proof in the form of employment records. *Dudley v. Textron, Inc.*, 386 F. Supp. 602, 606 (W.D. Pa. 1974). Indeed, the plain language of § 1981 supports the Supreme Court's own characterization of the statute: "[Section 1981] on its face relates primarily to racial discrimination in the making and enforcement of contracts." *Johnson v. Railway Express*, 421 U.S. 454, 459 (1975).

In addition, a review of the elements of causes of action brought under § 1981 and § 1983 further suggests that the two acts should be construed separately. Section 1983 requires, by its language and purpose, state action, while § 1981 can extend to acts of private discrimination. *Mahone v. Waddle*, 564 F.2d at 1031; *Jones v. Mayer Co.*, 392 U.S. at 437; *Johnson v. Railway Express*, 421 U.S. at 460. Section 1981 also requires racial animus, *Jones v. Mayer Co.*, 392 U.S. at 426, as well as discriminatory intent. *Croker v. Boeing Co.*, 662 F.2d 975, 988 (3d Cir. 1981) (en banc); *Craig v. County of Los Angeles*, 626 F.2d 659, 668 (9th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981). By contrast, racial animus need not be an element in a § 1983 cause of action, nor is there a requirement of intentional conduct or any other particular state of mind as a prerequisite to recovery. *Parrat v. Taylor*, 451 U.S. 527, 534-535 (1980).

III.

The majority concludes that unless claims under § 1981 are governed by the same statute of limitations as those under § 1983, the federal interest in uniformity and certainty in litigation as expressed in *Wilson v. Garcia*, 105 S. Ct. 1938 (1985), will be frustrated. The majority further concludes that, since the same facts could in some cases support a claim under either § 1981 or § 1983, applying different statutes of limitation would lead to a "bizarre result." Typescript at 12. While admittedly an overlap of 1981 and 1983 causes of action exists, that is no reason to ignore the significant differences in history, purpose, and application between the two causes of action outlined above. But just as some similarities between § 1981 and § 1983 may be recognized, so too are there differences in dimension between these two actions. These differences reflect traditional distinctions between tort and contract law which have legitimate, practical purposes under both state law and the federal Civil Rights statutes. In that context, I suggest that the majority's concerns about uniformity are misplaced and given greater weight than that to which they are entitled. Therefore, in addition to precedent and history, logic militates against today's holding.

The majority bases its uniformity argument largely on 42 U.S.C. § 1988, which provides that state law is to be consulted in setting the period of limitation for all civil rights claims. *Wilson*, 105 S. Ct. at 1943. Finding it "most significant" that § 1988 applies to both § 1981 and § 1983, typescript at 10, the majority concludes that the federal interest in uniformity in the enforcement of the civil rights statutes requires a common period of limitation.

Nothing in § 1988, however, requires that result. The statute only mandates that in cases where the laws

of the United States "are not adapted to the object" of enforcing civil rights.

> the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . .

If anything, this language supports a measure of deference to state law distinctions between tort and contract actions, so long as these distinctions are reflected in differences between and among the civil rights sections, and are therefore consistent with Federal law.

In fact, these tort-contract distinctions are real and substantial. First of all, as this court noted in *Meyers v. Pennypack Home Owners Assoc.*, 559 F.2d 894, 903 (3d Cir. 1979):

> "[T]he passage of time is less likely to impede the proof of facts" in a section 1981 and section 1982 action than in a state law physical injury action or a federal action under 42 U.S.C. § 1983, for example, and a longer statute of limitations may be appropriate.

(quoting *Dudley v. Textron, Inc.*, 386 F. Supp. 602 (E.D. Pa. 1979)).

Second, a longer statute of limitation for § 1981 claims relating to economic discrimination might actually *reduce* federal litigation, as a plaintiff before proceeding in federal court could afford to wait until the disposition of an administrative action -- for example, an action brought under the Fair Housing Act

or Title VII -- which would be more likely to overlap with a § 1981 action than with a § 1983 action.

That state legislatures have good reasons for distinguishing between contract and personal injury actions was noted by Justice O'Connor:

> [T]he legislative judgment to which this Court has traditionally deferred is not some purely arbitrary imposition of a conveniently uniform time limit. For example, a legislature's selection of differing limitations periods for a claim sounding in defamation and one based on a written contract is grounded in its evaluation of the characteristics of those claims relevant to the realistic life-expectancy of the evidence and the adversary's reasonable expectations of repose.

Wilson, 105 S. Ct. at 1950 (O'Connor, J., dissenting).

Similarly, there is good reason for treating § 1981 claims, which focus on economic discrimination often involving contracts and longer periods of patterned behavior, differently from § 1983 claims, which, by and large, more closely resemble torts for personal injury which result from discrete and more sharply identified events. The federal interest in uniformity and predictability is adequately served by treating alike all claims under a given section; it does not require that all claims under separate and distinct statutes be treated identically.

Furthermore, the majority's sought-after "uniformity" is illusory. Even among § 1983 claims, *Wilson* does not require identical treatment throughout the country, since different states may have different personal injury limitations periods. In fact, in *Wilson*, a three-year period was applied, rather than the two year period adopted by today's decision, 105 S. Ct. at 1949, or the one year period found

appropriated for Mississippi by the Fifth Circuit in *Gates v. Sprinks*, No. 84-4605, slip op. at 7018 (5th Cir. September 26, 1985). Thus, *Wilson* defers to state judgment on the appropriate balance of interests in setting the limitation period, even though it results in different periods being applied in § 1983 cases in New Mexico, Pennsylvania, Mississippi, and elsewhere throughout these United States. There is no reason not to defer similarly to state judgments that actions sounding in contract should be governed by a longer limitation period.

The majority's concern that applying a longer limitation period for § 1981 would lead to a "bizarre result" is unfounded. It is true that the same nucleus of operative fact sometimes could be characterized as either a § 1981 and or § 1983 claim and thereby receive different limitations treatment if the six-year statute was applied under § 1981. Such variations, however, are commonplace in the law. In a run-of-the-mill automobile accident case, for example, identical facts could give rise to warranty claims sounding in contract and strict liability claims sounding in tort -- each to be governed by a different statute of limitations. This is not thought to be a "bizarre result," and the possibility that the same or similar facts could support causes of action under different Civil Rights statutes is no more "bizarre."

Moreover, facts that could support either a § 1981 or a § 1983 claim could frequently also support a claim under Title VII, which has a 300 day limitation period in a deferral state like Pennsylvania. 42 U.S.C. § 2000e-5(e). This disparity is tolerated, however, because Title VII is distinguishable from other Civil Rights provisions, just as § 1981 is distinguishable from § 1983. Title VII covers a narrower range of situations than does § 1981, but is not limited to racial animus and does not require intentional

discrimination. "The choice [between Title VII and § 1981] is a valuable one. Under some circumstances the administrative route may be highly preferrable over the litigatory." *Johnson* v. Railway Express, 421 U.S. 454, 461 (1975). Moreover, "the remedies available under Title VII and under section 1981, although directed to most of the same ends, are separate, distinct, and independent." *Id.* Different statutes with different purposes may logically be governed by different statutes of limitation. Total uniformity in limitations periods for civil rights claims is therefore neither possible nor necessarily desirable.

In *Johnson*, 421 U.S. at 463-64, the Supreme Court stated:

> Although any statute of limitations is necessarily arbitrary, the length or period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting prosecution of stale ones . . . .

The legislatures of Pennsylvania, New Jersey, Delaware and the Virgin Islands have made such value judgments in distinguishing for limitations purposes between actions brought for contract and personal injury.[3] There is no reason why this court should not

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3. Pennsylvania, New Jersey and the Virgin Islands apply a six-year statute of limitations for contract actions. 42 Pa. Cons. Stat. § 5527 (1981); N.J. Stat. Ann. 2A:14-1 (West Supp. 1984); V.I. Code Ann. tit. 5 § 31(3)(A) (1967). Delaware provides for three years. Del. Code. Ann. tit. 10 § 8106 (1975). Pennsyvlania, New Jersey, Delaware and the Virgin Islands all apply the shorter two year limitation for actions brought for personal injury. 42 Pa. Cons. Stat. § 5524 (1981); N.J. Stat. Ann. 2A:14-2 (West 1952); Del. Code Ann. tit. 10 § 8119 (1975); V.I. Code Ann. tit. 5 § 31(5)(A) (1984 Supp.).

respect the recognition by the state legislatures that distinctions should be made, for limitations purposes, between actions for contract and personal injury, and conclude that such distinctions are properly reflected in the application of the civil rights statutes. Indeed, this court has so held. *See Davis v. United States Steel Supply*, 581 F.2d 335, 339 (3d Cir. 1978), *cert. denied*, 460 U.S. 1014 (1983); *Meyers*. Since *Wilson* does not compel a different result, we should stand by our sound prior analysis. For the foregoing reasons, I respectfully dissent.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing, Phila., Pa. 215-568-4264)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-1478 & 84-1509

CHARLES GOODMAN, RAMON L. MIDDLETON, ROMULUS C. JONES, JR., AND LYMAS L. WINFIELD, on their own behalf and on behalf of others similarly situated,

and

UNITED POLITICAL ACTION COMMITTEE, an unincorporated association, DOCK MEEKS, DAVID DANTZLER, JOHN HICKS, III, individually and on behalf of all others similarly situated

v.

LUKENS STEEL COMPANY, and INTERNATIONAL STEELWORKERS OF AMERICA (AFL-CIO), and LOCAL 1165, UNITED STEELWORKERS OF AMERICA (AFL-CIO), and LOCAL 2295, UNITED STEELWORKERS OF AMERICA (AFL-CIO)

United Steelworkers of America, AFL-CIO-CLC, and its Local Unions 1165 and 2295, Appellants in 84-1478

Lukens Steel Company, Appellant in 84-1509

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civ. No. 73-1328)

Argued June 11, 1985

Before: WEIS, GARTH, and STAPLETON,
Circuit Judges

Opinion Filed November 13, 1985

ORDER AMENDING OPINION

IT IS ORDERED that the opinion heretofore filed be amended as follows:

Place a period at the end of footnote 1 appearing on page 4 of the slip opinion;

On page 8 of the slip opinion, delete the word "out" appearing in the fifth line of the third paragraph;

In the first full paragraph appearing on page 13 of the slip opinion, in the fourth line, change "Words" to "Woods"; in line 13, close the quotation after the word "teaching" and change the citation to read "*Rubin v. Buckman*, 727 F.2d 71, 74 (3d Cir. 1984)"; in line 17, hyphenate the word "co-exist";

In the first full paragraph appearing on page 15 of the slip opinion, in the fourth line, hyphenate the word "class-wide";

In the third full paragraph appearing on page 17 of the slip opinion, in the fourth line, delete the word "the" before the word "defendants";

In the section title appearing on page 30 of the slip opinion, place a period after the Roman numeral "V".

BY THE COURT,

/s/ Joseph F. Weis, Jr.

United States Circuit Judge

Dated: November 22, 1985

December 12, 1985

Theodore Q. Thompson. Esquire
Nicholas Noel, III. Esquire
Robert J. Vedatsky. Esquire
Howard S. Epstein, Esquire
Willaim H. Platt, Wesquire
Patrick J. Reilly, Esquire
Edward R. Eidelman, Esquire

Re: Berstein v. Commonwealth of Pa., et al.,
No. *85-1371*.

Dear Counsel:

The Court would like counsel to comment on the possible applicability of *Goodman, et al. v. Lukens Steel,* slip opinion filed November 13, 1985, to this appeal. The comments may be by letter (original and three (3) copies) of no more than three (3) pages to be received in the Clerk's office on or before December 23, 1985.

A copy of *Lukens Steel* slip opinion is enclosed.

Very truly yours,

SALLY MVROS, Clerk

by: _____
Chief Deputy Clerk

MEF
Enclosure

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
R.S. § 1977.

42 U.S.C. § 1982. Property rights of citizens

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.
R.S. § 1978.

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia.
R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29,1979, 93 Stat. 1284.

42 U.S.C. § 1985. Conspiracy to interfere with civil rights

Preventing officer from performing duties

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

Obstructing justice; intimidating party, witness, or juror

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory , with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived in having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.
R. S. § 1980.

42 U.S.C. § 1986. Action for neglect to prevent

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such

wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.
R.S. § 1981.

42 Pa. Cons. Stat. Ann. §5524 (Purdon 1981) Two year limitation

The following actions and proceedings must be commenced within two years:

(1) An action for assault, battery, false imprisonment, false arrest, malicious prosecution or malicious abuse of process.

(2) An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another.

(3) An action for taking, detaining or injuring personal property, including actions for specific recovery thereof.

(4) An action for waste or trespass of real property.

(5) An action upon a statute for a civil penalty or forfeiture, where the action is given to a government unit.

(6) An action against any officer of any government unit for the nonpayment of money or the nondelivery of property collected upon or execution or otherwise in his possession.

1976, July 9, P.L. 586, No. 142, § 2, effective June 27, 1978.

42 Pa. Cons. Stat. Ann. §5527 (Purdon 1981) Six year limitation

The following actions and proceedings must be commenced within six years:

(1) An action upon a judgment or decree of any court of the United States or of any state.

(2) An action upon a contract, obligation or liability founded upon a bond, note or other instrument in writing, except an action subject to another limitation specified in this subchapter. *Where an instrument is payable upon demand, the time within which an action or proceeding on it must be commenced shall be computed from the later of either demand or any payment of principal or of interest on the instrument.*

(3) An action upon any official bond.

(4) A proceeding in inverse condemnation, if property has been injured but no part thereof has been taken, or if the condemnor has made payment in accordance with section 407(a) or (b) (relating to possession and payment of compensation) of the act of June 22, 1964 (Sp.Sess., P.L.84, No. 6), known as the "Eminent Domain Code."[1]

(5) An action to set aside a judicial sale of property.

1. This 1980 amendment added the second sentence to par. (2).

(6) Any civil action or proceeding which is neither subject to another limitation specified in this subchapter nor excluded from the application of a period of limitation by section 5531 (relating to no limitation).

1976, July 9, P.L. 586, No. 142, § 2, effective June 27, 1978. As amended 1980, Dec. 5, P.L. 1104, No. 189, § 5, imd. effective.

This act shall take effect immediately and the amendments to 42 Pa.C.S. §§ 761(a)(1)(iv), 933 (a)(1)(v), 5527(2) (as to instruments under seal) and 5529 effected by this act shall be retroactive to June 27, 1978.

Section 7 of Act 1980, Dec. 5, P.L. 1104, No. 189.

42 Pa. Cons. Stat. Ann. §5524 (Purdon Supp. 1985) Two year limitation

The following actions and proceedings must be commenced within two years:

(1) An action for assault, battery, false imprisonment, false arrest, malicious prosecution or malicious abuse of process.

(2) An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another.

(3) An action for taking, detaining or injuring personal property, including actions for specific recovery thereof.

(4) An action for waste or trespass of real property.

(5) An action upon a statute for a civil penalty or forfeiture.

(6) An action against any officer of any government unit for nonpayment of money or the nondelivery of property collected upon on execution or otherwise in his possession.

(7) Any other action or proceeding to recover damages for injury to person or property which is founded on negligent, intentional, or otherwise tortious conduct or any other action or proceeding sounding in trespass, including deceit or fraud, except an action or proceeding subject to another limitation specified in this subchapter.

As amended 1982, Dec. 20, P.L. 1409, No. 326, art. II, § 201, effective in 60 days.

* * *

Applicability of amendments.—Except as provided in section 404, the amendments to 42 Pa.C.S. Ch. 55 (relating to limitation of time) effected by this act shall apply only to causes of action which accrue after the effective date of this act.

Act 1982, Dec. 20, P.L. 1409, No. 326, §403

42 Pa. Cons. Stat. Ann. §5527 (Purdon Supp. 1985) Six year limitation

Any civil action or proceeding which is neither subject to another limitation specified in this subchapter nor excluded from the the application of a period of limitation by section 5531 (relating to no limitation) must be commenced within six years.

As amended 1982, Dec. 20, P.L. 1409, No. 326, art. II, § 201, effective in 60 days.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SANFORD BERNSTEIN,	:	C.A. NO. 83-3431
v.	:	
COMMONWEALTH OF PENNSYLVANIA, JAMES MCCARTHY, COUNTY OF LEHIGH, WILLIAM PLATT, ANTHONY PADRONE, WULF HEUSINGER, THOMAS MURTAUGH, DONALD LAYTON, DALE YEAGER, MICHAEL ALVIN, JIMMY H. COLEMAN, NANCY H. BERNSTEIN, CATASAUQUA POLICE DEPARTMENT, ALLENTOWN POLICE DEPARTMENT, AND WOODROW KEISER	:	JURY TRIAL DEMANDED

COMPLAINT

I. INTRODUCTION

1. This action for declaratory, injunctive and other relief is brought by Plaintiff to redress violations by the Defendants, acting individually, official and/or in abuse of their official capacities, and in concert and conspiracy with each other, under color of law, of rights secured by Plaintiff by the Constitution and Laws of the United States and Commonwealth of Pennsylvania.

2. The action arises under the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Title 42 U.S.C. Sections 1981, 1982, 1983, 1985(1-3), 1986 and 1988. By this action, Plaintiff challenges the pattern and practice of illegal conduct and the policies, customs, and/or usages of the Defendants, individually and in concert with each other, which deprived Plaintiff of his constitutional rights. Plaintiff also challenges the practice and/or customs of the Defendant County and municipal police departments failing to control and/or discipline the individual Defendants within their employ for abusing their positions of power and authority, and for failing to

control and/or discipline said employees for using and abusing their positions to violate the rights of Plaintiff.

II JURISDICTION AND VENUE

3. Jurisdiction is conferred on this Court by Title 28 U.S.C. Sections 1331 and 1343(1-4), and the aforementioned statutory and constitutional provisions. Jurisdiction of Plaintiff's claims arising under the laws of the Commonwealth of Pennsylvania exist by virtue of this Court's pendent jurisdiction.

4. The actions herein complained of occurred substantially in the Eastern District of Pennsylvania and/or within the jurisdiction of Lehigh County. Venue is properly laid in the Eastern District of Pennsylvania by virtue of Title 28 U.S.C. Section 1391(b).

III. PLAINTIFF

5. Plaintiff Sanford Bernstein is and was at all times described in this Complaint, a citizen of the United States and the Commonwealth of Pennsylvania and resides at 330 N. Marshall Street, Allentown, Lehigh County, Pennsylvania.

IV. DEFENDANTS

6. Defendant Commonwealth of Pennsylvania, is and was at all times described in this Complaint, in whose name false and infamous charges were brought against Plaintiff for.

7. Defendant James McCarthy, was at all times described in this Complaint, a police officer with the Allentown Police Department.

8. Defendant County of Lehigh, is and was at all times described in this Complaint, employed William Platt as its District Attorney.

9. Defendant William Platt, is and was at all times described in this Complaint, District Attorney for Lehigh County.

10. Defendant Anthony Padrone, is and was at all times described in this Complaint, an individual residing at 1320 Powder Mill Lane, Emmaus, Pennsylvania, and at all times relevant hereto, was employed by and received monies from Nancy H. Bernstein and also a member of the Castasauqua Police Department.

11. Defendant Wulf Heusinger, is and was at all times described in this Complaint, an individual residing at 303 S. 34th Street, Allentown, Lehigh County, Pennsylvania.

12. Defendant Thomas Murtaugh, is and was at all times described in this Complaint, an individual residing at 258 York Street, Castasauqua, Pennsylvania, and at all times relevant hereto, was employed by and received monies from Nancy H. Bernstein and also a member of the Castasauqua Police Department.

13. Defendant Donald Layton, is and was at all times described in this Complaint, a Police Officer for the Allentown Police Department, and at all times relevant hereto, was employed by and received monies from Nancy H. Bernstein.

14. Defendant Dale Yeager, is and was at all times described in this Complaint, an individual residing at 100 Lindberg Avenue, Salisbury Township, Pennsylvania.

15. Defendant Michael Alvin, is and was at all times described in this Complaint, an individual residing in Lehigh County, and at all times relevant hereto, was employed by and received monies from Nancy H. Bernstein and also a member of the Castasauqua Police Department.

16. Defendant Jimmy H. Coleman, is and was at all times described in this Complaint, residing in Emmaus, Pennsylvania.

17. Defendant Nancy H. Bernstein, is and was at all times described in this Complaint, residing at 100 Lindberg Avenue, Allentown, Pennsylvania, and employed those individual defendants identified above.

18. Defendant Castasauqua Police Department, is and was at all times described in this Complaint, employed those individual defendants identified above in the capacity of police officers.

19. Defendant Allentown Police Department, is and was at all times described in this Complaint, employed those individual defendants identified above in the capacity of police officers.

20. Woodrow Keiser, is and was at all times described in this Complaint, residing at 5879 E. Main Street, Fogelsville, Pennsylvania, and was employed by and received monies from Nancy H. Bernstein.

21. The individual Defendants are being sued in their individual and/or official capacity.

22. Defendants Commonwealth of Pennsylvania, County of Lehigh, William Platt, Anthony Padrone, Wulf Heusinger, Thomas Murtaugh, Donald Layton, Dale Yeager, Michael Alvin, Jimmy H. Coleman, Nancy H. Bernstein, James McCarthy, Woodrow Keiser, Catasauqua Police Department and Allentown Police Department, are now and were at all times relevant hereto, acting in their respective capacities, under color of law and pursuant to their respective authority, or apparent authority.

23. Defendants, acting individually and in concert, acted under color of law and/or pretense of law. Each individual Defendant, individually and in concert with each other, engaged in a pattern of illegal conduct and/or carried out official policies described hereinafter which resulted in the injuries to the Plaintiff and deprived Plaintiff of rights, privileges and immunities described herein.

24. The individual Defendants, in abuse of their position and apparent authority under color of law, conspired with private individuals against Plaintiff to deny him of rights, privileges and immunities in violation of his civil rights.

V. CAUSES OF ACTION

COUNT I

25. The Plaintiff was charged with the crime of criminal solicitation to murder his estranged wife, Nancy H. Bernstein in a complaint filed in the County of Lehigh, Pennsylvania, on December 5, 1978.

26. Venue was changed from Lehigh County to Dauphin County and the Plaintiff was convicted of said crime after trial by jury.

27. Plaintiff was sentenced to 5-10 years and has served ½ of his minimal sentence.

28. On January 28, 1983, the Superior Court of the Commonwealth of Pennsylvania, vacated the sentence of the Plaintiff and ordered that the Plaintiff be admitted to bail in the amount of $200,000.00. See Exhibit A attached hereto and made a part hereof.

29. The vacation of Plaintiff's sentence was due, in part, to the recantation by Defendant Jimmy Coleman on March 17, 1980, of his trial testimony against Plaintiff so that an evidentiary hearing as to Defendant Coleman's credibility can be determined. See Exhibit B attached hereto and made a part hereof.

30. At the evidentiary hearing held on April 4, 1983, in the Court of Common Pleas of Dauphin County, Defendant Coleman asserted his Fifth Amendment privilege against self incrimination since the District Attorney of Lehigh County had not granted Defendant Coleman immunity from prosecution as to his testimony at Plaintiff's trial and the recantation statement. See Exhibit C attached hereto and made a part hereof.

31. On or before May 5, 1983, the District Attorney of Lehigh County granted Defendant Coleman absolute immunity from prosecution for perjury as to his trial testimony only. Defendant Coleman was not granted immunity from prosecution as to his recantation statement. On May 5, 1983, Defendant did provide a statement recanting his recantation statement of March 17, 1980 in the matter of *Commonwealth v. Bernstein,* Court of Common Pleas of Lehigh County, Criminal Division, No. 40/1979. See Exhibit D attached hereto and made a part hereof.

32. Plaintiff believes, and therefore avers, that he was denied his right to petition for a redress of his grievances as a direct result of a conspiracy by and Between Defendants Platt, Padrone, McCarthy, Heusinger, Murtaugh, Layton, Yeager, Alvin, Kesier, Coleman and Nancy Bernstein in that the criminal charge against Plaintiff was actually a result of their agreement to frame and/or set up Plaintiff for the charge of solicitation for murder.

33. Further, Defendants noted in paragraph 32 above actively tried to entrap Plaintiff into the crime for which he was charged.

34. The Defendants noted in paragraph 32 above knowingly concocted and encouraged perjury by various Commonwealth witnesses at Plaintiff's criminal trial.

35. Defendants also denied Plaintiff's right against unlawful and unreasonable search of his residence by having Defendant McCarthy gain entry without a search warrant or probable cause on December 5, 1978.

36. Plaintiff was denied his right of not having to answer to a capital or otherwise infamous crime unless presented with a Bill of Information so as prepare an adequate defense.

37. Plaintiff was denied due process of law by the Defendants conspiring to frame him, utilizing known perjured testimony at Plaintiff's trial, intimidating Plaintiff's witnesses both prior to and subsequent to his trial

into not providing testimony on his behalf, denying Defendant Coleman immunity as to his recantation statement so that he could testify on April 4, 1983 at Plaintiff's evidentiary hearing ordered by the Superior Court of Pennsylvania, threatening Defendant Coleman subsequent to his recantation statement until he agreed to recant his recantation on May 5, 1983, and utilizing their respective positions of authority or apparent authority under color of law to effectuate the above, and/or also accepting monies from Defendant Nancy Bernstein to accomplish the above since at least December 5, 1978 through to and including July 15, 1983.

38. Plaintiff was denied to have compulsory process and testimony of witnesses favorable to him due direct as a result of the intimidation and interference of the Defendants as noted in paragraph 37 above.

39. As further reflected in Exhibits E, F, and G attached hereto and made a part hereof, Defendant Coleman had complained to his attorney of the threats on his life that he was receiving from Defendants Murtaugh, Padrone and Heusinger as a direct result of his March 17, 1980 recantation statement. At Defendant Coleman's request, his attorney attempted to have criminal charges brought against Defendants Murtaugh, Padrone and Heusinger, but Defendant Platt, because of his involvement in the conspiracy against Plaintiff and his having accepted money from Defendant Nancy Bernstein.

40. The actions of the Defendants were intended and did result in taking property from Plaintiff without due process of law in that it was their purpose "to take the rich Jew for everything that he's got." Plaintiff is Jewish and did possession considerable wealth prior to his arrest of December 5, 1978, having a net worth in the millions of dollars.

41. The actions of the Defendants who were in official positions of authority, acted outside the scope of their respective offices, though in abuse of their office under color of law, for purposes of personal financial

gain. Such Defendants acted in concert and conspiracy with Defendants Coleman, Nancy Bernstein and Woodrow Keiser, and have collectively been paid hundreds of thousands of dollars since the commencement of this conspiracy to frame and/or set up Plaintiff.

42. The Defendants actions violated Plaintiff's rights under 42 U.S.C. Section 1981, 1982, 1983, 1985(1-3) and 1986, in that he is a member of a class of persons, rich and Jewish, that Defendants was intending on depriving of his right to give evidence in court, have his property rights protected, being subjected to cruel and usual punishment, to be subjected to a conspiracy to frame him for a crime he did not commit, to have witnesses not to be intimidated or threatened from testifying on Plaintiff's behalf, to permit a key witness in his criminal trial to testify as to his recantation statement without having his life threatened and being granted immunity only if he recants his recantation, to not have justice impeded, hindered, obstructed or defeated so as to deny Plaintiff a fair and full hearing and enforce his rights under the criminal justice system, and to be free from conspiracies as above detailed because he is a wealthy Jewish person.

COUNT II

43. The allegations in paragraphs 1-42 are incorporated by reference herein as though fully set forth as same may be applicable to the Defendants referred to below.

44. On December 5, 1978, Defendant McCarthy did unlawfully enter Plaintiff's premises, without probable cause or a search warrant, and did search the premises and seize certain materials. He further subjected Plaintiff to a police dog attack without provocation or justification.

45. On that same date, Defendants Murtaugh and Padrone took Defendant Coleman and his roommate,

Ronald DeRuvo, to the home of Defendant Nancy Bernstein where a "party" was already going on. In attendance at this "party" was Defendants Heusinger, Layton, McCarthy and Platt.

46. On December 5, 1978 and prior to that date, Defendant Nancy Bernstein promise to pay Defendants Padrone, Heusinger, Murtaugh, Layton, Alvin, Keiser and Coleman for their cooperation in the conspiracy to frame Plaintiff. Defendant Nancy Bernstein has made payments to the above named Defendants for their assistance in framing Plaintiff and their perjured testimony at trial.

47. Defendant Nancy Bernstein has also paid monies to Defendants Murtaugh, Padrone, among others to intimidate and threaten witnesses of Plaintiff both prior to and subsequent to Plaintiff's trial; these same Defendants also threatened the lives of Defendant Coleman and his family as a direct result of his recantation statement.

48. As a direct result of Defendants' wrongful acts, Plaintiff has suffered and continues to suffer from ill-health which is life-threatening and has required extensive medical attention, ridicule, embarrassment, vexation, humiliation with his community, mental anguish and extreme distress.

49. Such wrongful acts of the Defendants were oppressive, malicious, outrageous, wilful, wanton, reckless and abusive.

COUNT III

50. The allegations in paragraphs 1-49 are incorporated by reference herein as though fully set forth as same may be applicable to the Defendants referred to below.

51. Defendants Platt, Padrone, Heusinger, Murtaugh, Layton, Alvin, Yeager, Keiser, Coleman and Nancy Bernstein engaged in a conspiracy with each

other since prior to December 5, 1978 through to and including the present to cover-up and conceal their conspiracy to frame Plaintiff, intimidate Plaintiff's witnesses, deprive Plaintiff of his property, encourage and solicit perjured testimony and otherwise obstruct or hinder justice.

52. The Defendants acted in conspiracy with each other and under color of law and/or their apparent authority of their respective positions to wilfully deprive Plaintiff of his right to peaceably pursuit his livelihood and enjoy all the rights, privileges and immunities secured to him.

53. Further, the acts and conduct of the Defendants constitute malicious prosecution, abuse of process, official oppression, negligence and gross negligence, malicious interference with the economic and employment of Plaintiff under the laws of the Commonwealth of Pennsylvania and this Court has pendent jurisdiction to hear and adjudicate said claims.

VI. PRAY FOR RELIEF

WHEREFORE, Plaintiff prays this Court to advance this case on the docket, order a speedy trial at the earliest practical date, cause this case to be in every way expedited and on such hearing to the Court that it:

1. Grant Plaintiff a declaratory judgment that Defendants, jointly and severally, individually and in their respective capacities, have denied Plaintiff rights, privileges and immunities under the Constitution and Laws of the Commonwealth of Pennsylvania;

2. Issue a preliminary and permanent injunction prohibiting Defendants, their successors,

agents and employees, and all those acting in concert with them, from denying Plaintiff rights, privileges and immunities under the Constitution and Laws of the Commonwealth of Pennsylvania;

3. Grant Plaintiff a declaratory judgment that the policies, practices and acts complained of herein are illegal and unconstitutional;

4. Grant Plaintiff a preliminary and permanent injunction enjoining the Defendants from discriminating and/or retaliating against the Plaintiff for the filing of this action;

5. Enter a declaratory judgment that the practices complained of herein are unlawful and violative of the Civil Rights Act of 1866;

6. Other modification or elimination of practices, policies, customs and usages set forth herein and all other such practices shown to be in violation of applicable law so that they do not discriminate, retaliate or violate rights of Plaintiff;

7. Order all individual Defendants to provide a full and certified accounting of all monies received by them since 1978 to the present from Defendant Nancy Bernstein;

8. Order Defendant Nancy Bernstein to provide a full and certified accounting of all monies paid out or over to the individual Defendants named since 1978 to the present;

9. Order Defendant Nancy Bernstein to provide a full and certified accounting of all monies received by her since 1978 to the present;

10. Award compensatory damages to Plaintiff in the amount in excess of $10,000,000.00 as to all Defendants;

11. Award punitive damages to Plaintiff in the amount in excess of $25,000,000.00 as to individually named Defendants;

12. Grant such other and further relief as this Court may deem appropriate, including costs and reasonable attorney's fees.

THEODORE Q. THOMPSON
ATTORNEY FOR PLAINTIFF

COMMONWEALTH of Pennsylvania

v.

Sanford BERNSTEIN, Appellant.

Superior Court of Pennsylvania.

Argued Sept. 22, 1981.

Filed Jan. 28, 1983.

Defendant was convicted in the Court of Common Pleas, Dauphin County, Criminal Division, No. 836 of 1979, Dowling, J., of criminal solicitation to murder, and he appealed. The Superior Court, No. 223 Harrisburg 1980, McEwen, J., held that evidence was sufficient to warrant full evidentiary hearing on issue of credibility of recantation testimony of a prosecution witness.

Judgment vacated and case remanded for evidentiary hearing.

Before BROSKY, McEWEN and BECK, JJ.

McEWEN, Judge:

We here review an appeal from a judgment of sentence to a term of imprisonment of from five to ten years and a fine of $25,000.00 imposed following a finding by a jury that appellant Sanford Bernstein was guilty of criminal solicitation to murder his then estranged wife. We vacate the judgment of sentence and remand for an evidentiary hearing.

Appellant first argues that the Common Pleas Court committed an abuse of discretion when it denied the motion for a new trial on the basis of after-discovered evidence, specifically, a recantation statement made by Jim Coleman, a principal Commonwealth witness and an acquaintance of both appellant and Mrs. Bernstein.[1] Cole-

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1. Appellant has included in the reproduced record statements from two persons which corroborate the recantation statement of

man testified at trial that appellant told him, "I want you to blow my wife away" and asked Coleman to name his price. The next day Coleman informed Mrs. Bernstein and one of her private security guards about this conversation, and they in turn informed the Allentown Police Department.[2] Tony Padrone, an officer of the Catasauqua Police Department, and one of the number of private guards hired by Mrs. Bernstein, contrived with Coleman to arrange a telephone conversation between Coleman and appellant over which Padrone and two other officers, who also worked as private security guards for Mrs. Bernstein, might eavesdrop. In the presence of Officers Padrone, Layton and Alvin. Coleman advised appellant by telephone that he himself could not carry out the murder but that he could arrange for someone else to do so, and pursuant to the plan of the officers, Coleman subsequently advised appellant that Alvin would be interested in the job. Coleman further testified that appellant subsequently discussed with Alvin, at an arranged meeting, the different methods of and fees for the murder of Mrs. Bernstein and delivered to Alvin the sum of $5,000.00 as partial payment for the murder.

The after-discovered evidence upon which the motion for new trial was based was a recantation statement made by Coleman in which he stated (1) that appellant only kidded about "blowing his wife away"; (2) that, following his meeting with appellant, appellant did not contact Coleman, but, rather, the law enforcement officials, who also acted as private security guards for Mrs. Bernstein, were the ones who suggested that Coleman get in touch with appellant; (3) that when appellant met

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Coleman. Appellant did not, however, refer to these two statements in the motion for new trial on the basis of after-discovered evidence. Thus, we do not consider these statements in our review of this case.

2. Mrs. Bernstein testified at trial that as a result of prior threats made against her by appellant, she had hired a number of off-duty police officers to act as private security guards.

Alvin, Coleman did not hear any discussion concerning a plan for the murder of Mrs. Bernstein; and (4) that the officers employed by Mrs. Bernstein had told him what to say.

Our Supreme Court has held that after-discovered evidence is the basis for a new trial if it:

> (1) has been discovered after the trial and could not have been obtained at or prior to the conclusion of the trial by the exercise of reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely for impeaching credibility of a witness; and (4) is of such nature and character that a different verdict will likely result if a new trial is granted.

Commonwealth v. Valderrama, 479 Pa. 500, 505, 388 A.2d 1042, 1045 (1978), citing *Commonwealth v. Mosteller*, 446 Pa. 83, 88, 284 A.2d 786, 788 (1971).

The Common Pleas Court here carefully scrutinized the after-discovered evidence but did not conduct an evidentiary hearing. Rather, the court determined that, even if the recantation statement were true, the recantation evidence was more corroborative than contradictory, the points in conflict were not critical and the evidence was not of such a nature as to compel a different result than the verdict of guilty that had been rendered by the jury. As a result, the court refused to grant a new trial on the basis of this after-discovered evidence.

[1] It is our view, however, that the after-discovered evidence, namely, the allegations in the notarized statement of Mr. Coleman, the principal Commonwealth witness, given some six months after the trial, is not merely corroborative, is not merely cumulative and does not merely impeach the credibility of a witness. Rather, the post-trial statements of Mr. Coleman impact not only upon the state of mind of appellant during those early discussions which composed a portion of the criminal solicitation, but also upon the defense of appellant that

the agents employed to guard the purported victim were provocateurs who stimulated the criminal solicitation. While it may be true that the Commonwealth produced evidence that would have enabled a finding of guilt even without the testimony of Mr. Coleman, a premise of some doubt, the testimony of Mr. Coleman was an integral part of the presentation of the Commonwealth and his testimony concerning the criminal conduct of Mr. Bernstein, as well as the activities of the agents of Mrs. Bernstein, was certainly evidence that would have received careful consideration by the jury. We conclude, therefore, that the after-discovered evidence is of sufficient substance that the Common Pleas Court must hold an evidentiary hearing to determine whether the recantation statement of Mr. Coleman is credible.

[2-4] We realize that recantation testimony is considered extremely unreliable and that it is the duty of the trial court to deny a new trial unless satisfied that such testimony is true. *Commonwealth v. Gaddy*, 492 Pa. 434, 424 A.2d 1268 (1981); *Commonwealth v. Nelson*, 484 Pa. 11, 398 A.2d 636 (1979); *Commonwealth v. Coleman*, 438 Pa. 373, 264 A.2d 649 (1970). The issue of credibility can better be resolved, however, when the trial court conducts a full evidentiary hearing and is thereby able to observe the manner and demeanor of the witness as he delivers his recantation testimony in an adversary proceeding. See *Commonwealth v. Gaddy, supra*. The conduct of such a hearing is especially necessary in this case since the Common Pleas Court Judge who studied and decided the post-trial motions was not the trial judge and had not been afforded an opportunity to witness the testimony and observe the demeanor of the recantating witness. Thus, we remand to the Common Pleas Court to conduct an evidentiary hearing and determine whether the recantation evidence is sufficiently credible to warrant the grant of a new trial.

Appellant sets forth three additional questions for our consideration:

Did the lower court abuse its discretion in sentencing the appellant to the maximum sentence provided by the law?

Was trial counsel ineffective for failing to object to improper remarks in the prosecutor's closing speech?

Was trial counsel ineffective for failing to request an instruction to evaluate Commonwealth witnesses, Michael Alvin and/or James Coleman, as accomplices?

After a thorough review of the record and a careful study of the briefs for the parties, we conclude that there is no merit to these contentions.

Accordingly, we vacate the judgment of sentence and remand for an evidentiary hearing consistent with this opinion. Jurisdiction is relinquished.

March 2, 1984

Theodore Q. Thompson, Esquire
10 North Main Street
Ambler, PA 19002

In re: Sanford Bernstein
vs: Nancy Bernstein, et. al.
Federal Civil Rights Action

Dear Ted:

Pursuant to the colloquy held between Judge Cahn and myself at the time of the agrument on the Motion for Summary Judgment and, further, in response to your Motion for Production of Documents and Things as amended at the colloquy, you will find enclosed herewith copies of all checks drawn by my client, Nancy Bernstein, from 1978 to the present time in payment for security services. Further, enclosed herewith are copies of all checks payable to cash in the amount of $1,000.00 or more.

My client has advised me that at no time did she receive any invoices from the individual security officers or from the Murtaugh Detective Agency and as a result, I cannot supply any to you. You will note in reviewing these checks that there is also a copy of the check payable to the District Attorney's campaign fund referred to previously.

I have reviewed the tax returns of Nancy Bernstein as she supplied them to me from 1977 to and including 1982 and can advise you that no deductions were taken for any payments made to any co-defendants in this case. This representation is made to you based upon the returns that my client gave me for my review and I believe that the returns were complete.

I shall assume unless I hear from you to the contrary that this satisfies the Request for Production of Documents as amended before the Honorable Edward Cahn at the time of the oral argument on the Motion for Summary Judgment.

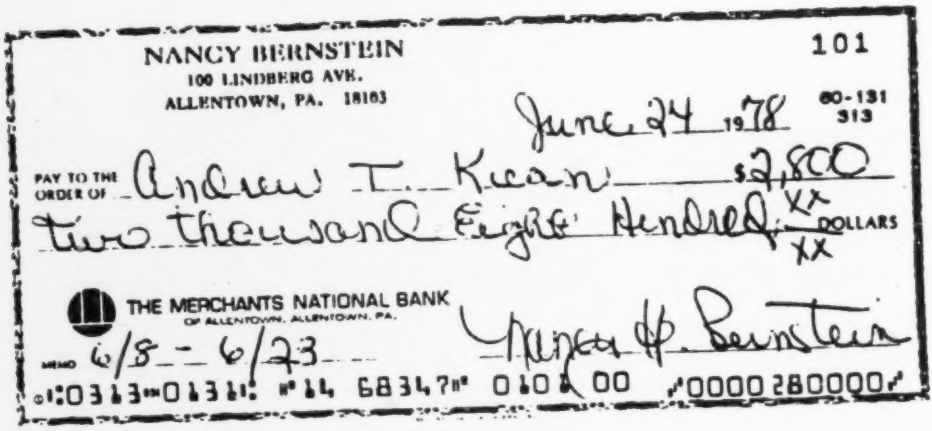
Very truly yours,

HOWARD S. EPSTEIN

HSE/sg

Enclosures

cc: Mrs. Nancy H. Bernstein



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

101

June 24 1978

60-131
313

PAY TO THE ORDER OF Andrew T. Kean $2,800

two thousand Eight Hundred XX/XX DOLLARS

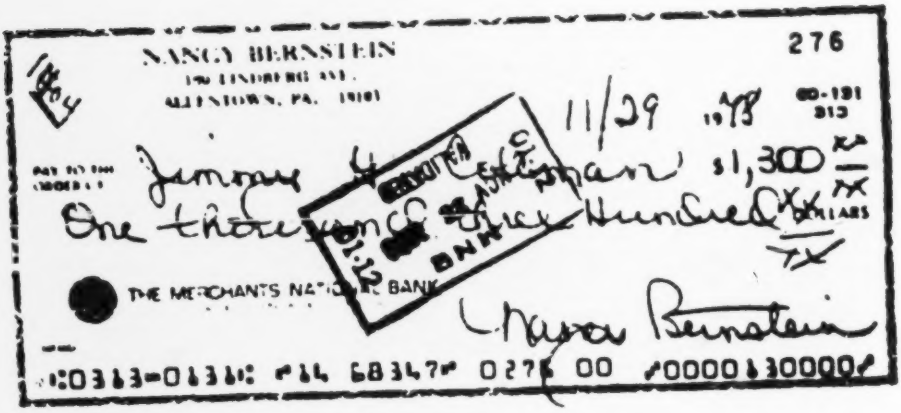
THE MERCHANTS NATIONAL BANK
OF ALLENTOWN, ALLENTOWN, PA.

MEMO 6/8 - 6/23

Nancy H. Bernstein

⑆0313⑈0131⑆ ⑈14 68347⑈ 0101 00 ⑈0002800000⑈

1



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

276

11/29 1978

60-131
313

PAY TO THE ORDER OF Jeremy H. Epstein $1,300 XX

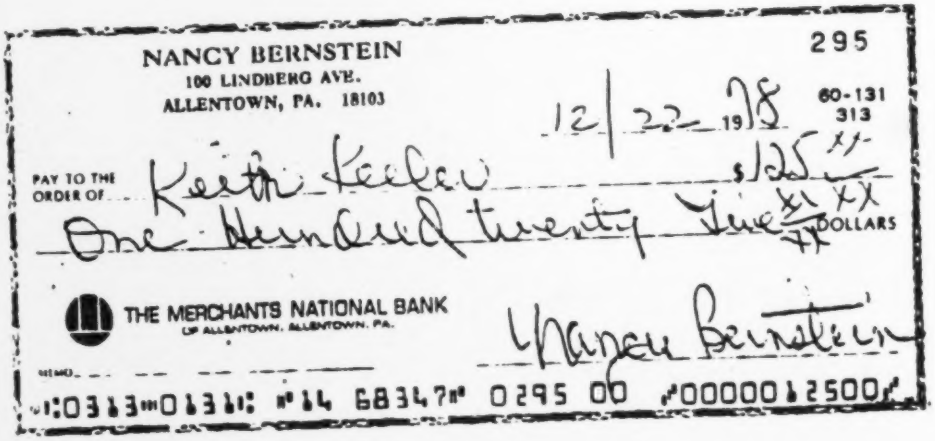
One thousand three Hundred XX/XX DOLLARS

THE MERCHANTS NATIONAL BANK

Nancy Bernstein

⑆0313⑈0131⑆ ⑈14 68347⑈ 0276 00 ⑈0001300000⑈

2



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

295

12/22 1978

60-131
313

PAY TO THE ORDER OF Keith Keelan $125 XX

One Hundred twenty five XX/XX DOLLARS

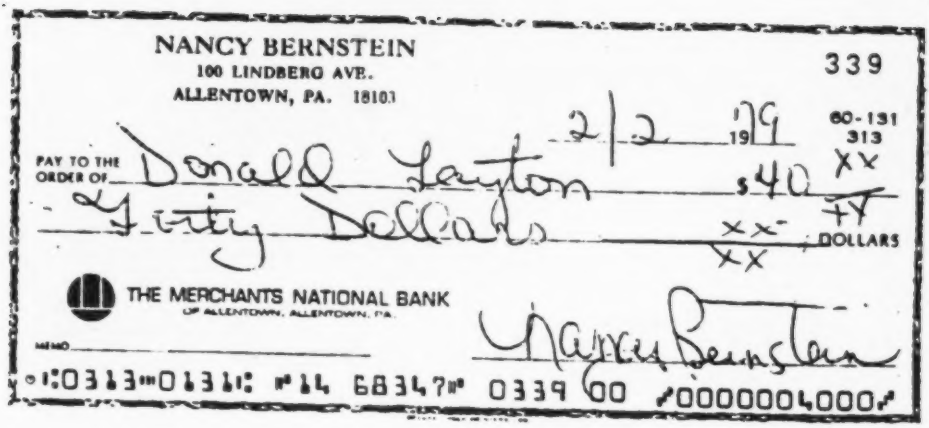
THE MERCHANTS NATIONAL BANK
OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆0313⑈0131⑆ ⑈14 68347⑈ 0295 00 ⑈0000012500⑈

3



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

339

2/2 19 79

60-131
313

PAY TO THE ORDER OF Donald Layton $40 XX

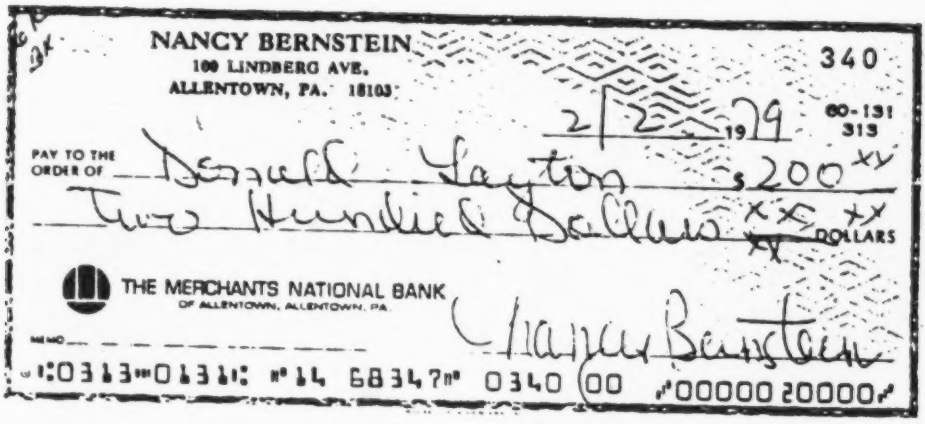
Forty Dollars XX DOLLARS

THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆:0313⑈0131⑆ ⑈14 68347⑈ 0339 00 ⑈0000004000⑈



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

340

2/2 19 79

60-131
313

PAY TO THE ORDER OF Donald Layton $200 XX

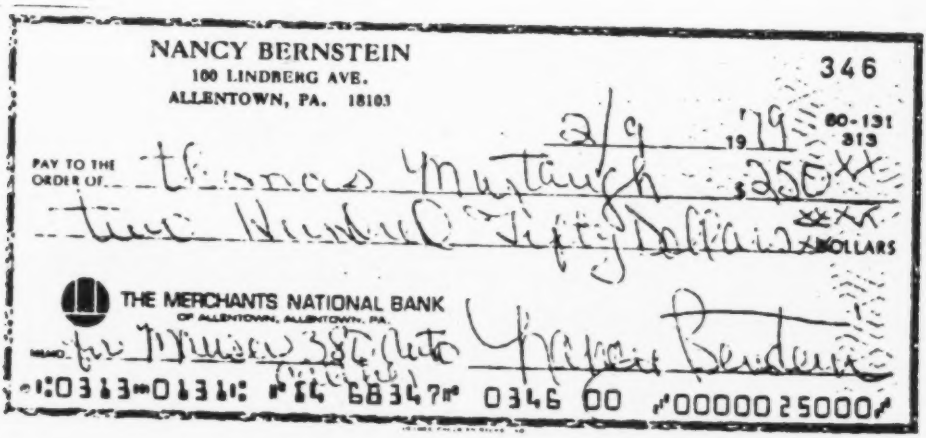
Two Hundred Dollars XX DOLLARS

THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆:0313⑈0131⑆ ⑈14 68347⑈ 0340 00 ⑈00000 20000⑈



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

346

2/9 19 79

60-131
313

PAY TO THE ORDER OF Frances Mautner $250 XX

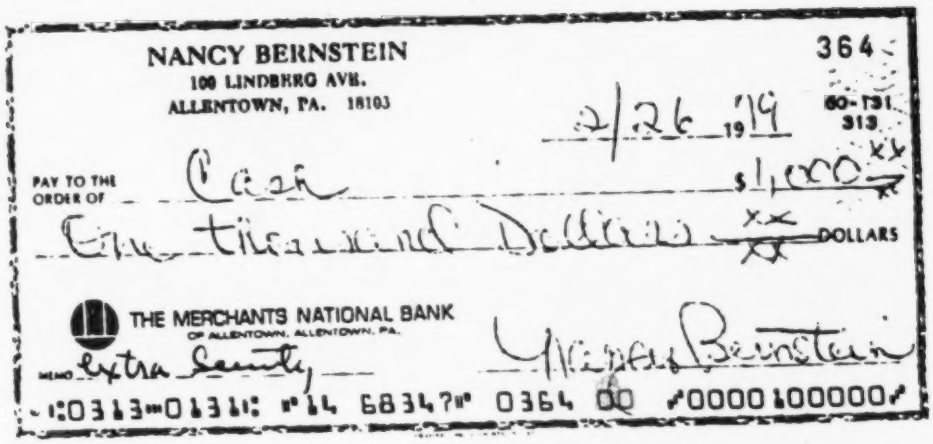
Two Hundred Fifty Dollars XX DOLLARS

THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO for Nissan 280 Auto

Nancy Bernstein

⑆:0313⑈0131⑆ ⑈14 68347⑈ 0346 00 ⑈00000 25000⑈


NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

364

60-131
313

2/26 19 79

PAY TO THE ORDER OF Cash $1,000 xx

One Thousand Dollars xx DOLLARS

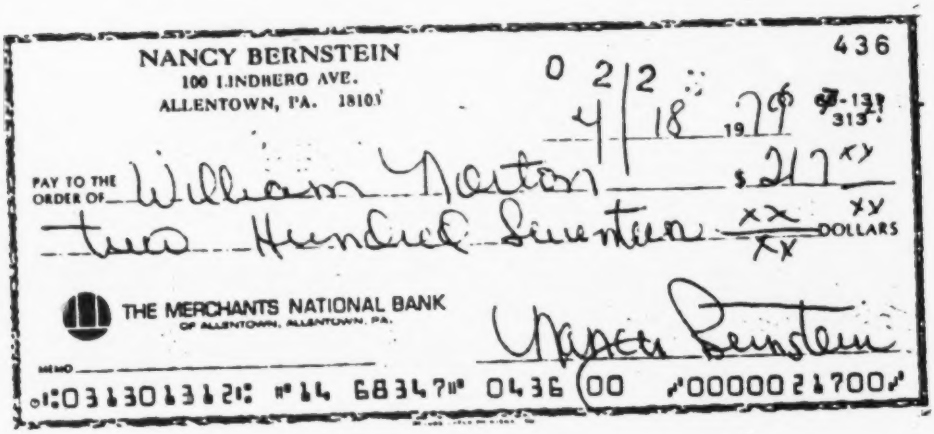
THE MERCHANTS NATIONAL BANK
OF ALLENTOWN, ALLENTOWN, PA.

MEMO Extra Security

Nancy Bernstein

⑈0313⑈0131⑆ ⑈64 68347⑈ 0364 00 ⑈0000100000⑈

7


NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

436

0212

60-131
313

4/18 19 79

PAY TO THE ORDER OF William Norton $217 xx

Two Hundred Seventeen xx DOLLARS

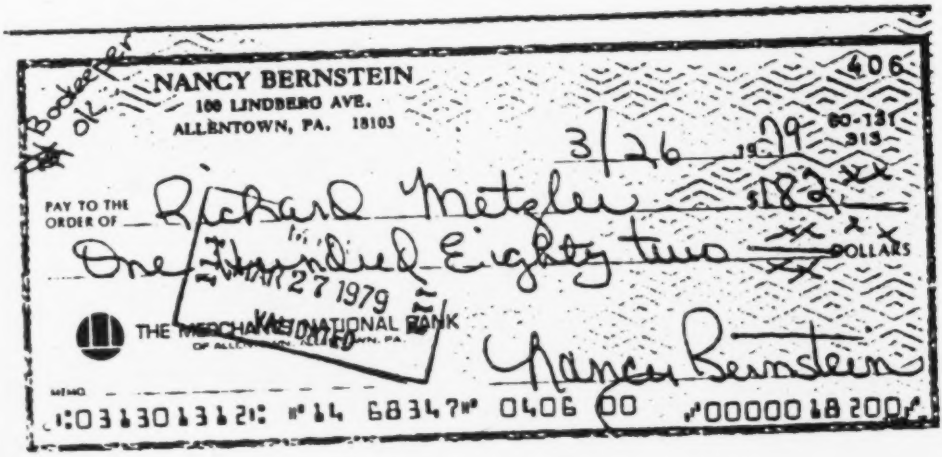
THE MERCHANTS NATIONAL BANK
OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆:0313⑆0131⑆ ⑈64 68347⑈ 0436 00 ⑈0000021700⑈

8


Bodger OK

NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

406

60-131
313

3/26 19 79

PAY TO THE ORDER OF Richard Metzler $182 xx

One Hundred Eighty two xx DOLLARS

MAR 27 1979

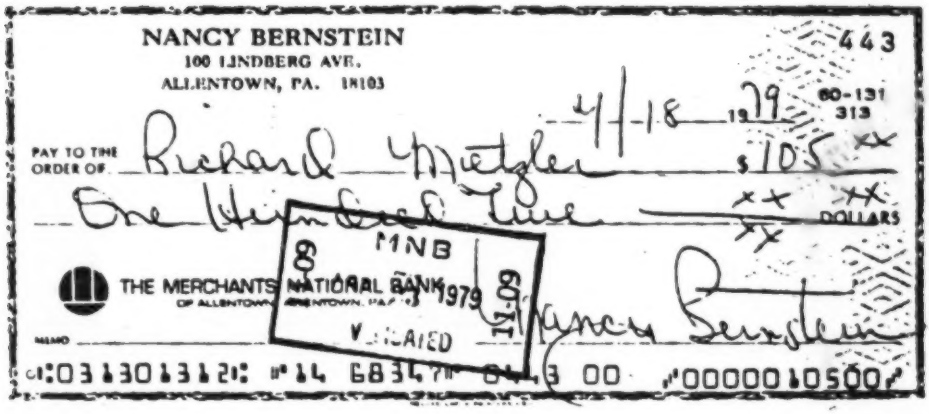
THE MERCHANTS NATIONAL BANK
OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆:0313⑆0131⑆ ⑈64 68347⑈ 0406 00 ⑈0000018200⑈

9



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

443

4/18 19 79 60-131 313

PAY TO THE ORDER OF Richard Metzler $ 105 xx

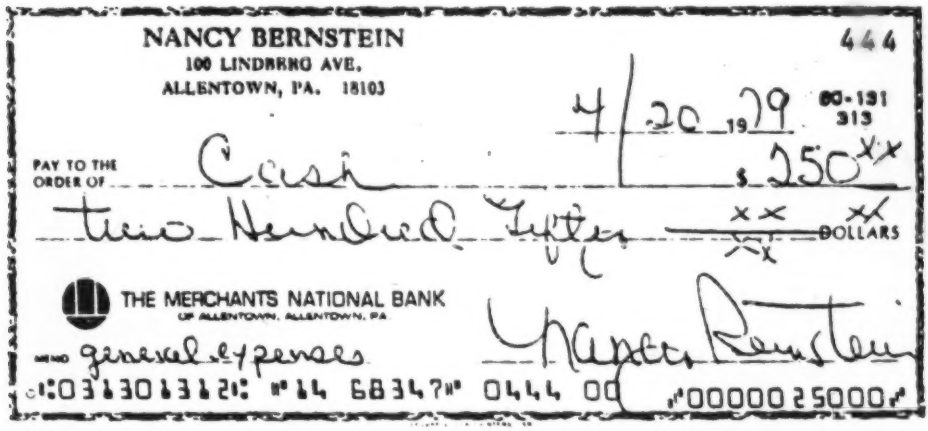
One Hundred Five xx DOLLARS

MNB APR 19 1979 VALIDATED

THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA

Nancy Bernstein

⑆03130131⑇ ⑈44 68347⑈ 0443 00 ⑈00000 10500⑈



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

444

4/20 19 79 60-131 313

PAY TO THE ORDER OF Cash $ 250 xx

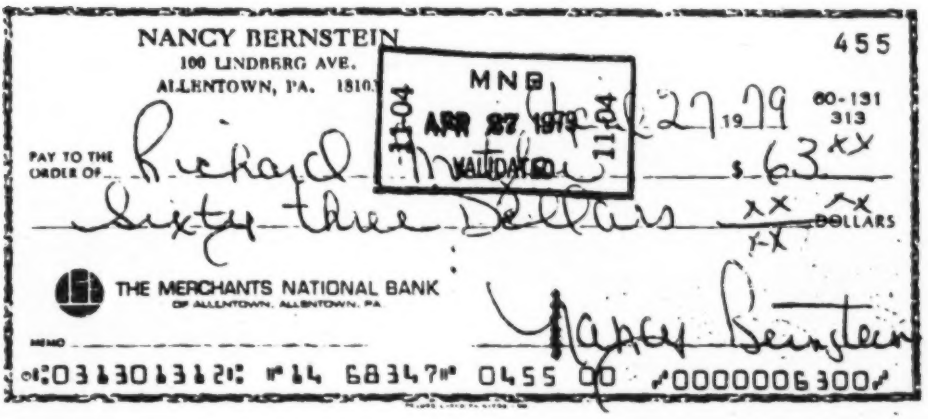
two Hundred Fifty xx DOLLARS

THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA

MEMO general expenses

Nancy Bernstein

⑆03130131⑇ ⑈44 68347⑈ 0444 00 ⑈00000 25000⑈



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

455

MNB APR 27 1979 VALIDATED 11-04 11-04

4/27 19 79 60-131 313

PAY TO THE ORDER OF Richard Metzler $ 63 xx

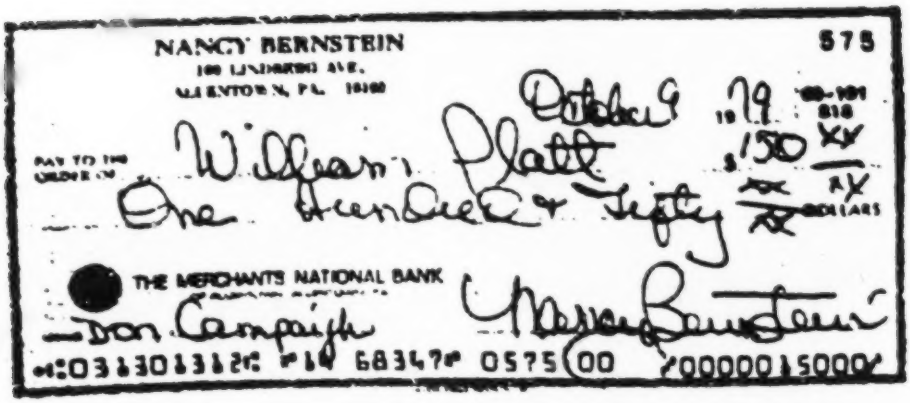
Sixty three Dollars xx DOLLARS

THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA

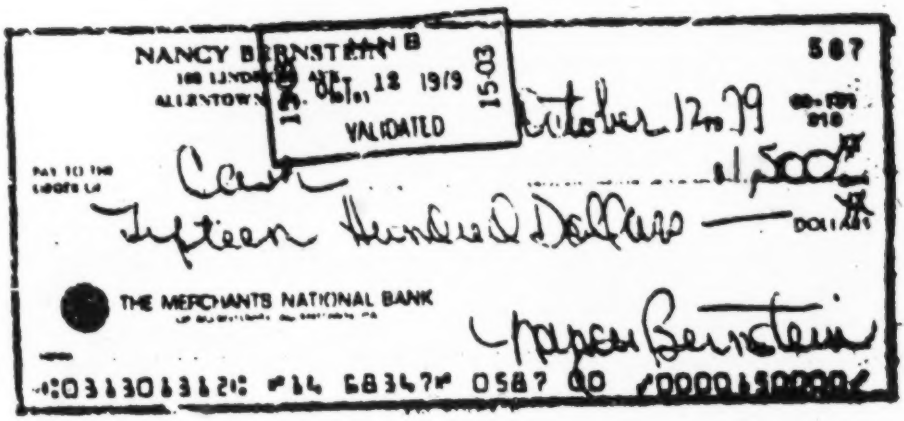
MEMO

Nancy Bernstein

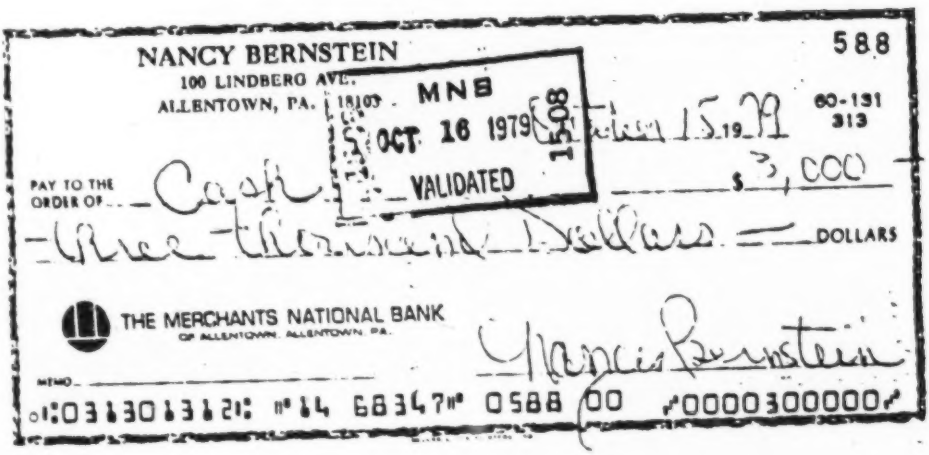
⑆03130131⑇ ⑈44 68347⑈ 0455 00 ⑈0000006300⑈


NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103
575
October 9 19 79
60-131
313
PAY TO THE ORDER OF William Platt
$ 150
One Hundred Fifty XX DOLLARS
THE MERCHANTS NATIONAL BANK
Don Campaigh
Nancy Bernstein
⑆031301312⑆ ⑈14 68347⑈ 0575 00 ⑈00001500⑈

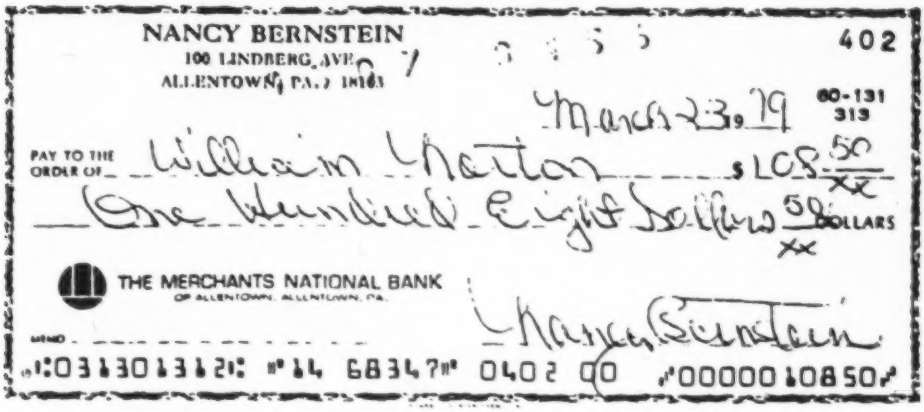
13


NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103
MNB
OCT 12 1979
1503
VALIDATED
587
October 12 19 79
60-131
313
PAY TO THE ORDER OF Cash
$ 1,500
Fifteen Hundred Dollars DOLLARS
THE MERCHANTS NATIONAL BANK
Nancy Bernstein
⑆031301312⑆ ⑈14 68347⑈ 0587 00 ⑈00001500⑈

14


NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103
MNB
OCT 16 1979
1508
VALIDATED
588
October 15 19 79
60-131
313
PAY TO THE ORDER OF Cash
$ 3,000
Three thousand Dollars DOLLARS
THE MERCHANTS NATIONAL BANK
OF ALLENTOWN, ALLENTOWN, PA.
Nancy Bernstein
MEMO
⑆031301312⑆ ⑈14 68347⑈ 0588 00 ⑈0003000⑈

15



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

402

March 23 19 79 60-131 313

PAY TO THE ORDER OF William Hatton $ 108.50 XX

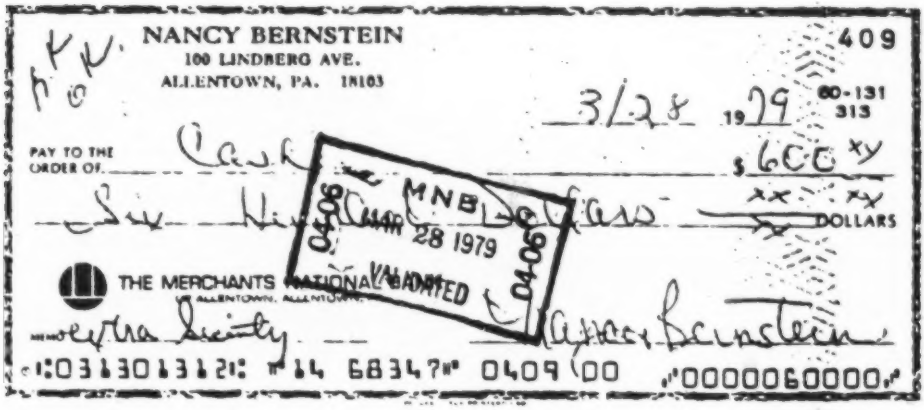
One Hundred Eight Dollars 50 XX DOLLARS

THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆031301312⑆ ⑈44 68347⑈ 0402 00 ⑈00000108 50⑈



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

409

3/28 19 79 60-131 313

PAY TO THE ORDER OF Cash $ 600 XX

Six Hundred Dollars XX DOLLARS

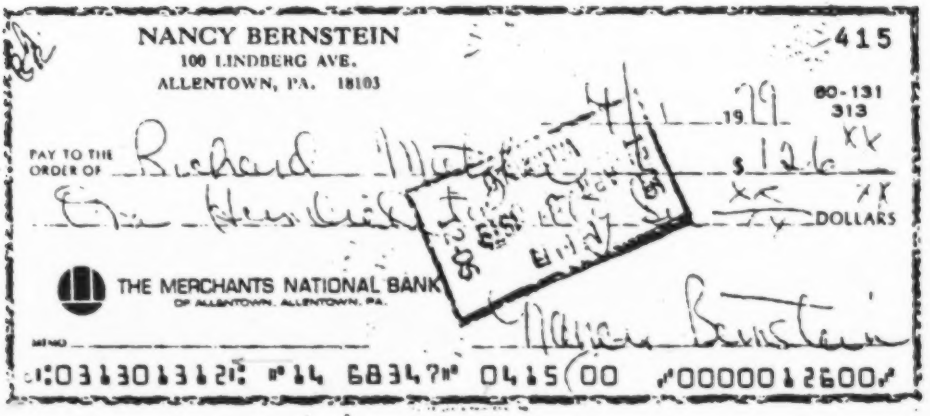
MNB MAR 28 1979 0406 VALIDATED 0406

THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO extra Liberty

Nancy Bernstein

⑆031301312⑆ ⑈44 68347⑈ 0409 00 ⑈0000060000⑈



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

415

4/1 19 79 60-131 313

PAY TO THE ORDER OF Richard Mattes $ 126 XX

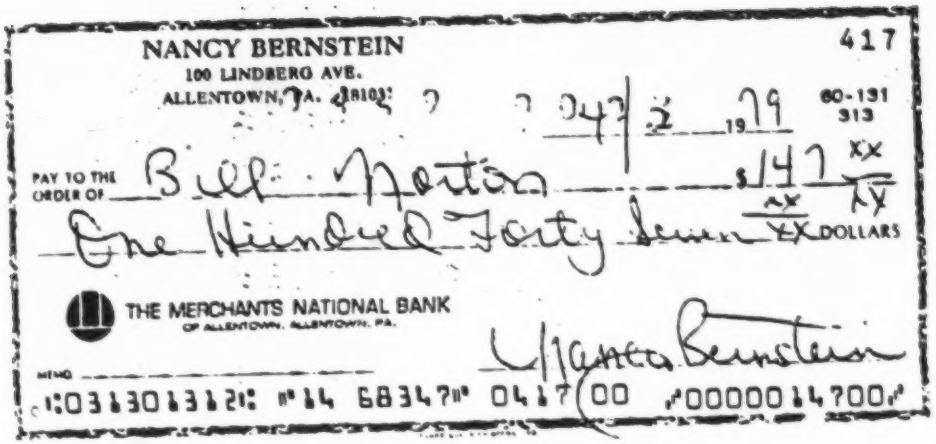
One Hundred Twenty Six XX DOLLARS

THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆031301312⑆ ⑈44 68347⑈ 0415 00 ⑈0000012600⑈


NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

417

60-131
313

PAY TO THE ORDER OF Bill Morton $147 XX

One Hundred Forty Seven XX DOLLARS

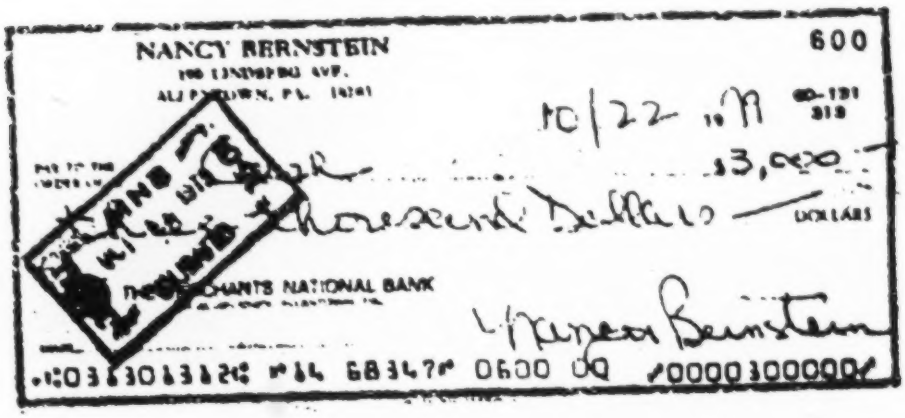
THE MERCHANTS NATIONAL BANK
OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆03630631⑆ ⑈64 68347⑈ 0417 00 ⑈000001470⑈

19


NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

600

10/22 19 77

60-131
313

PAY TO THE ORDER OF [illegible] $3,000

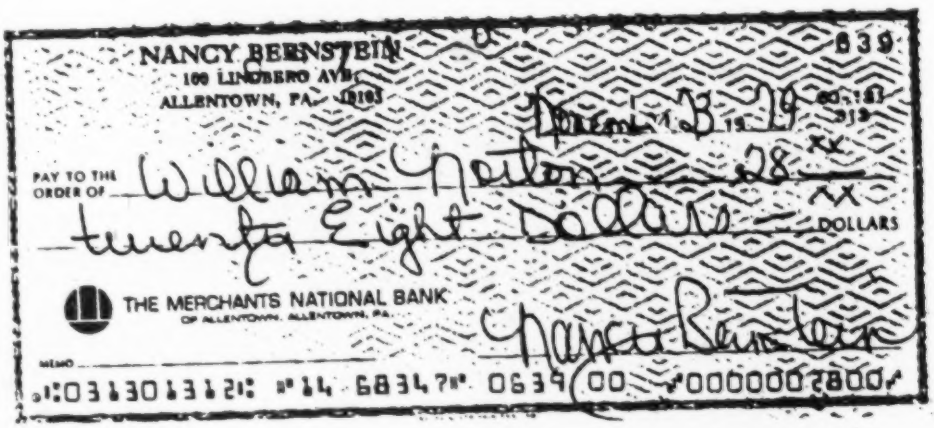
three thousand Dollars DOLLARS

MERCHANTS NATIONAL BANK

Nancy Bernstein

⑆03630631⑆ ⑈64 68347⑈ 0600 00 ⑈000030000⑈

20


NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

839

December 28 19 77

60-131
313

PAY TO THE ORDER OF William Morton $28 XX

twenty Eight Dollars DOLLARS

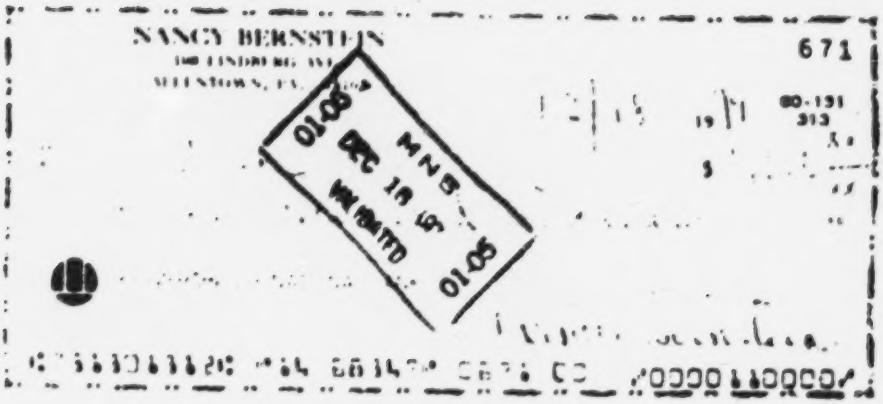
THE MERCHANTS NATIONAL BANK
OF ALLENTOWN, ALLENTOWN, PA.

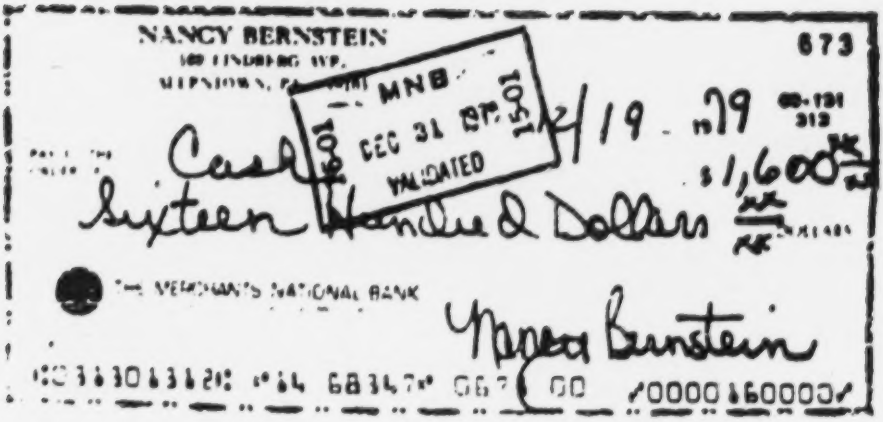
MEMO

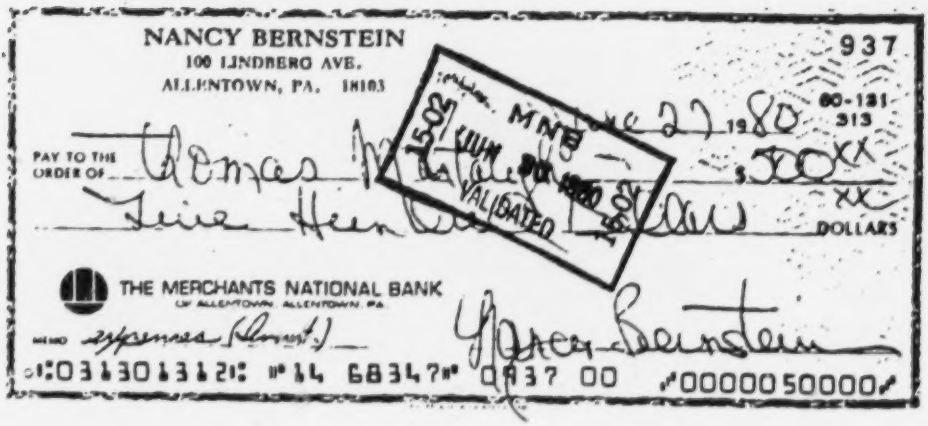
Nancy Bernstein

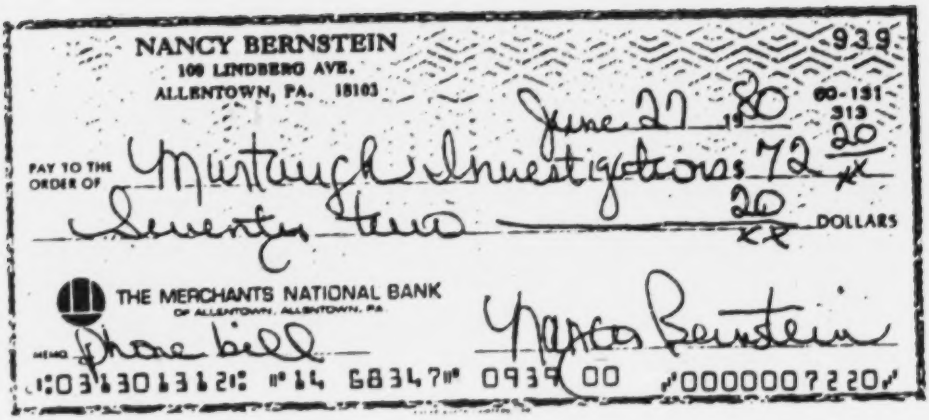
⑆03630631⑆ ⑈64 68347⑈ 0839 00 ⑈000002800⑈

21


NANCY BERNSTEIN
671
MNB
DEC 19 '79
VALIDATED
01-05
80-131
313


NANCY BERNSTEIN
673
MNB
DEC 31 '79
VALIDATED
12/19, 79
80-131
313
Cash
Sixteen Hundred & Dollars
THE MERCHANTS NATIONAL BANK
Nancy Bernstein


NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103
937
MNB
JUN 27 '80
VALIDATED
June 27 1980
80-131
313
PAY TO THE ORDER OF
DOLLARS
THE MERCHANTS NATIONAL BANK
OF ALLENTOWN, ALLENTOWN, PA.
MEMO
Nancy Bernstein



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

939

June 27 1980

60-131
313

PAY TO THE ORDER OF Mentaugh Investigations $72.20

Seventy two 20/100 DOLLARS

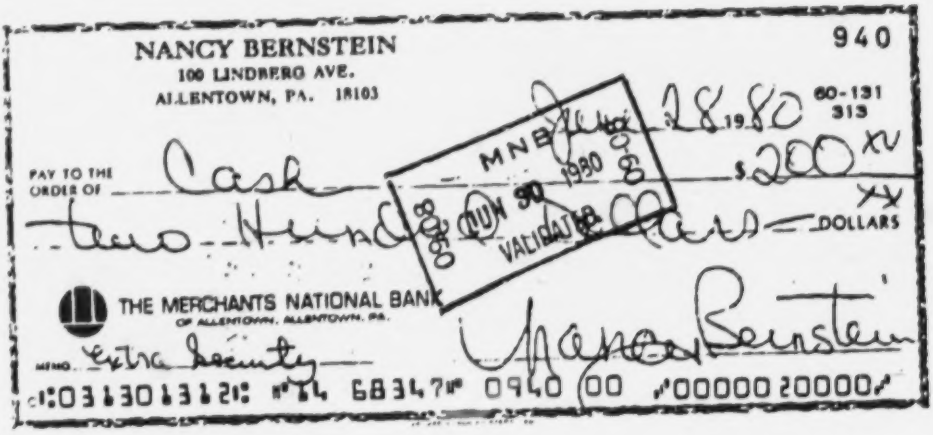
THE MERCHANTS NATIONAL BANK
OF ALLENTOWN, ALLENTOWN, PA

MEMO Phone bill

Nancy Bernstein

⑆03130131⑆ ⑈64 68347⑈ 0939 00 ⑈00000722O⑈

25



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

940

June 28 1980

60-131
313

PAY TO THE ORDER OF Cash $200.00

MNB JUN 30 1980 VALIDATED

two Hundred and no/100 DOLLARS

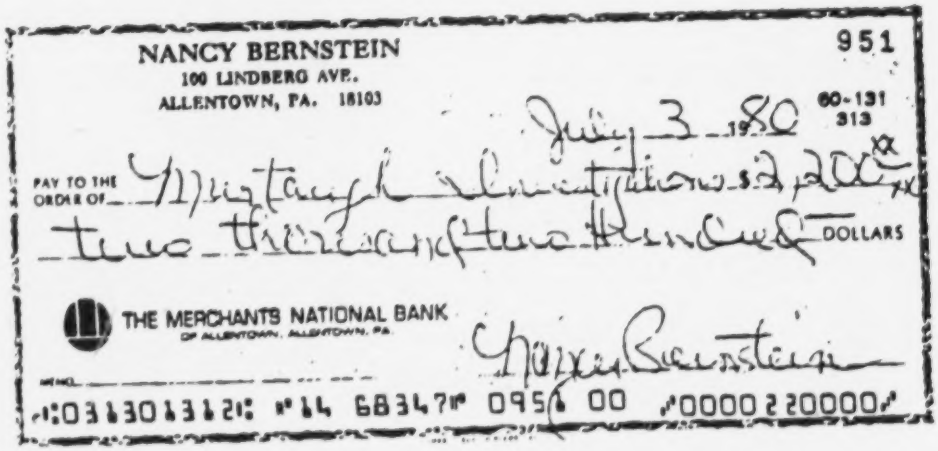
THE MERCHANTS NATIONAL BANK
OF ALLENTOWN, ALLENTOWN, PA

MEMO Extra Security

Nancy Bernstein

⑆03130131⑆ ⑈64 68347⑈ 0940 00 ⑈00000 20000⑈

26



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

951

July 3 1980

60-131
313

PAY TO THE ORDER OF Mentaugh Investigations $2,200.00

two thousand two hundred and no/100 DOLLARS

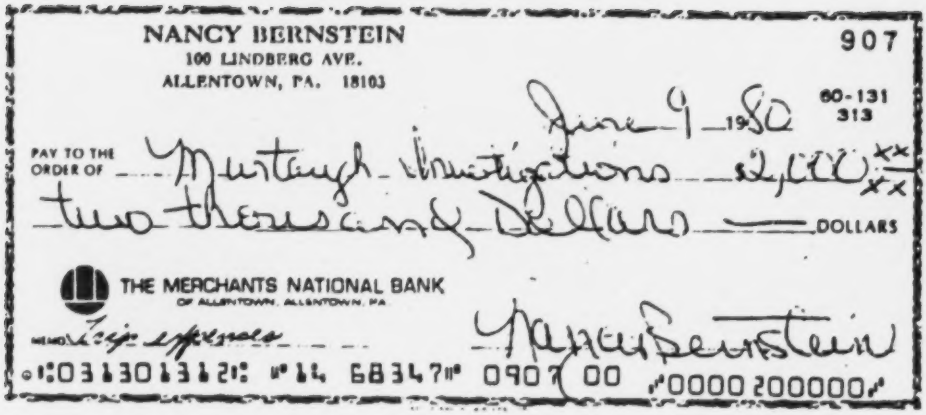
THE MERCHANTS NATIONAL BANK
OF ALLENTOWN, ALLENTOWN, PA

MEMO

Nancy Bernstein

⑆03130131⑆ ⑈64 68347⑈ 0951 00 ⑈0002 20000⑈

27



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

907

June 9 1980

60-131
313

PAY TO THE ORDER OF Mortaugh Investigations $2,000 XX

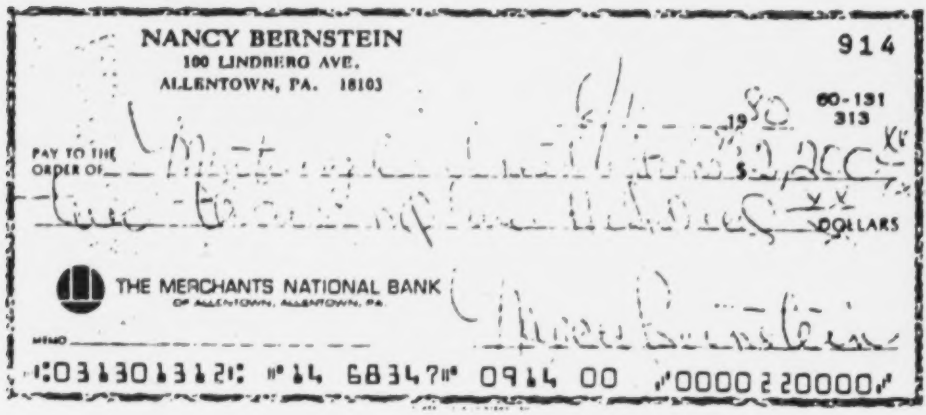
two thousand DOLLARS

THE MERCHANTS NATIONAL BANK
OF ALLENTOWN, ALLENTOWN, PA.

MEMO Legal expenses

Nancy Bernstein

⑆031301312⑆ ⑈14 68347⑈ 0907 00 ⑈0000200000⑈



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

914

6/11 1980

60-131
313

PAY TO THE ORDER OF Mortaugh Investigations $2,000 XX

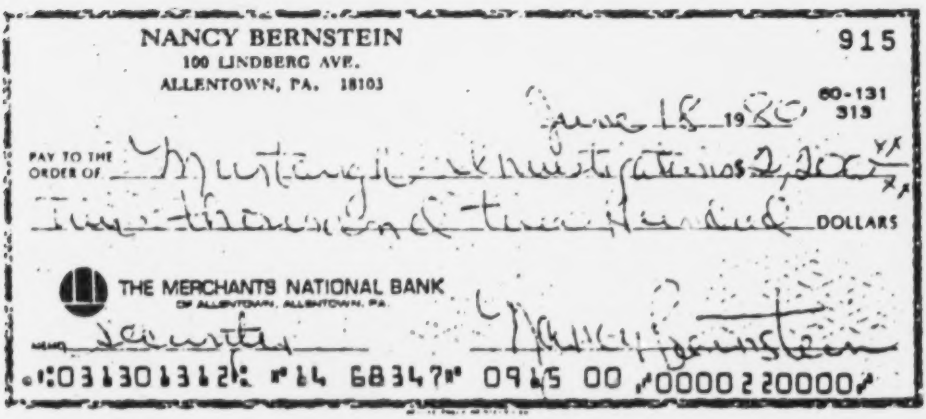
two thousand DOLLARS

THE MERCHANTS NATIONAL BANK
OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆031301312⑆ ⑈14 68347⑈ 0914 00 ⑈0000220000⑈



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

915

June 15 1980

60-131
313

PAY TO THE ORDER OF Mortaugh Investigations $2,000 XX

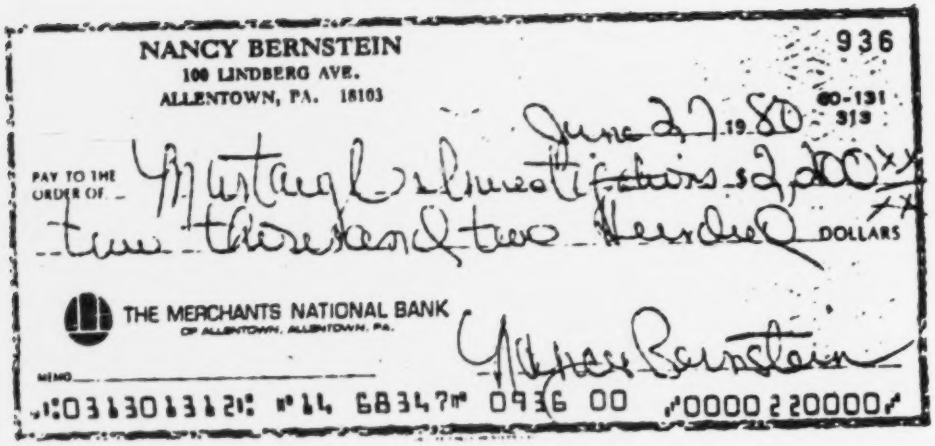
two thousand DOLLARS

THE MERCHANTS NATIONAL BANK
OF ALLENTOWN, ALLENTOWN, PA.

MEMO Security

Nancy Bernstein

⑆031301312⑆ ⑈14 68347⑈ 0915 00 ⑈0000220000⑈


NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

936

June 27 19 80 60-131 313

PAY TO THE ORDER OF Mutual Investments $2,200 XX

two thousand two hundred DOLLARS

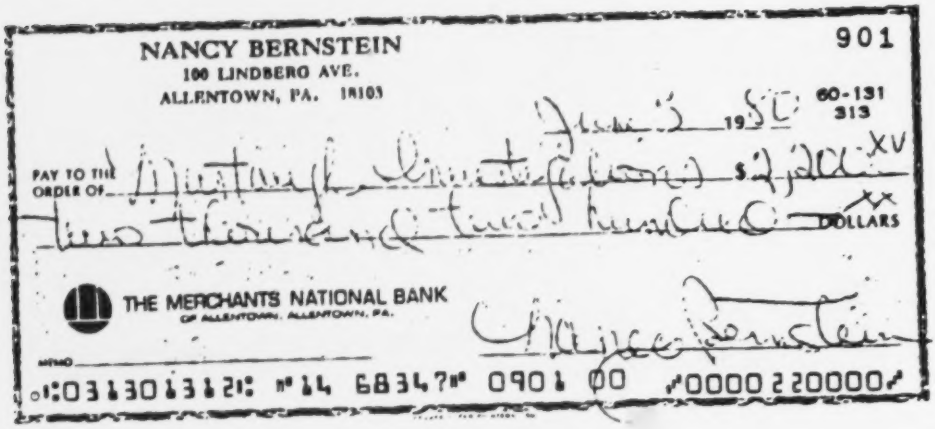
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑈03130131⑈ ⑈14 68347⑈ 0936 00 ⑈0000220000⑈

31


NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

901

June 3 19 80 60-131 313

PAY TO THE ORDER OF Mutual Investments $2,200 XV

two thousand two hundred DOLLARS

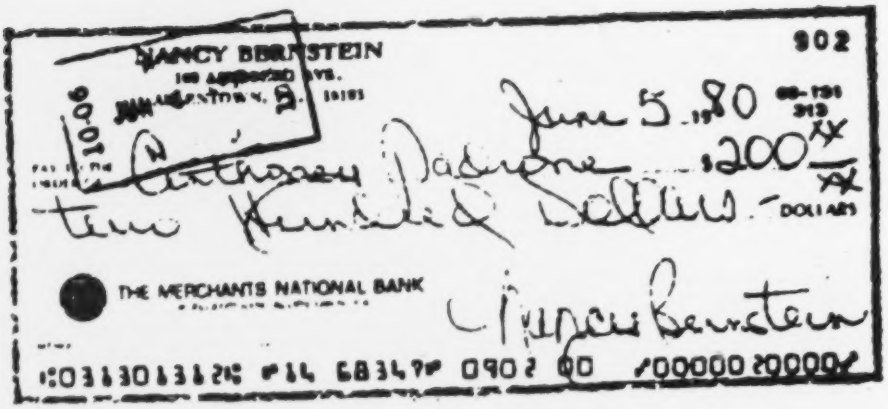
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑈03130131⑈ ⑈14 68347⑈ 0901 00 ⑈0000220000⑈

32


NANCY BERNSTEIN
100 ALLENTOWN AVE.
ALLENTOWN, PA. 18103

902

June 5 19 80 60-131 313

PAY TO THE ORDER OF Catherine Dadrone $200 XX

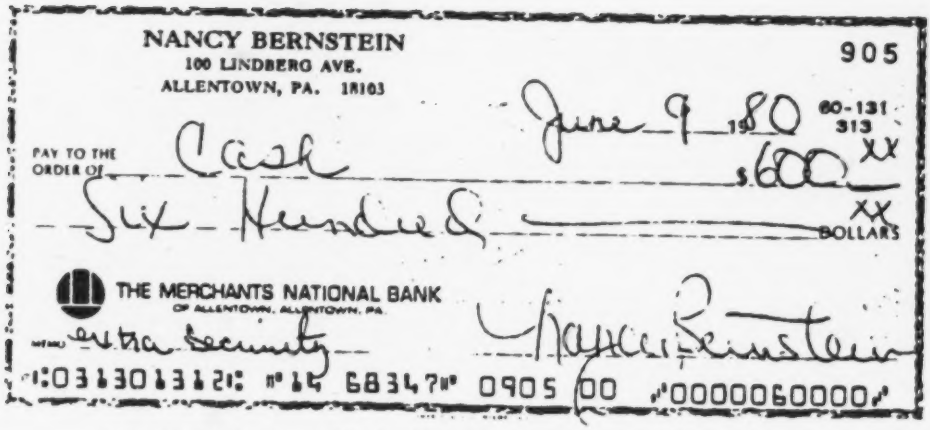
two hundred DOLLARS

THE MERCHANTS NATIONAL BANK

Nancy Bernstein

⑈03130131⑈ ⑈14 68347⑈ 0902 00 ⑈0000220000⑈

33



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

905

June 9 1980 60-131 313

PAY TO THE ORDER OF Cash $600 XX

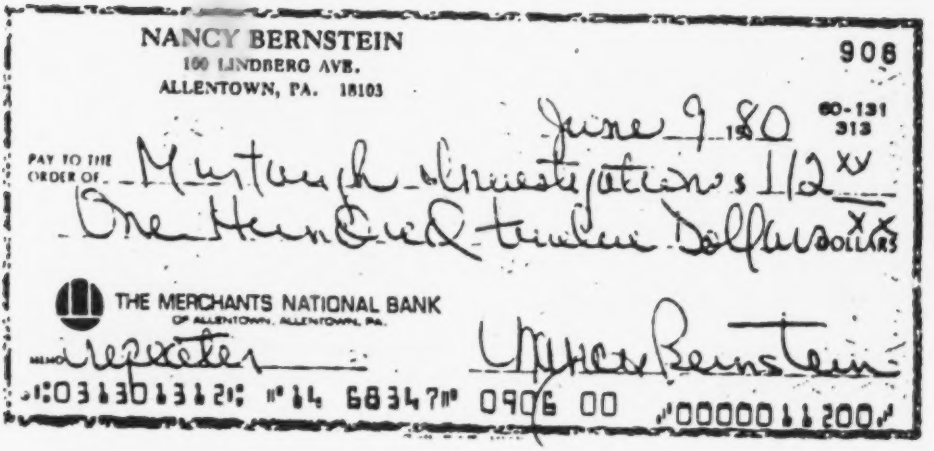
Six Hundred XX DOLLARS

THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO extra security

Nancy Bernstein

⑈03130131⑈ ⑈65 68347⑈ 0905 00 ⑈0000060000⑈



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

906

June 9 1980 60-131 313

PAY TO THE ORDER OF Municipal Investigations $ 1/2 XX

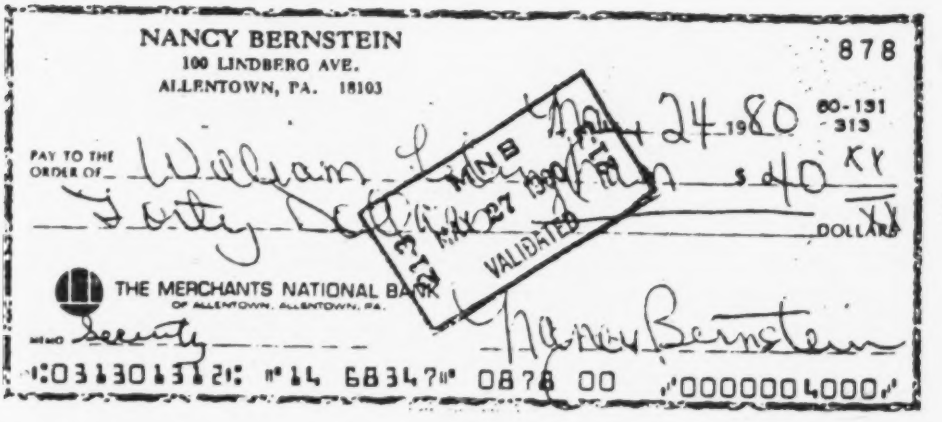
One Hundred two Dollars XX DOLLARS

THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO repeater

Nancy Bernstein

⑈03130131⑈ ⑈64 68347⑈ 0906 00 ⑈0000011200⑈



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

878

June 24 1980 60-131 313

PAY TO THE ORDER OF William [illegible] $40 XX

Forty XX DOLLARS

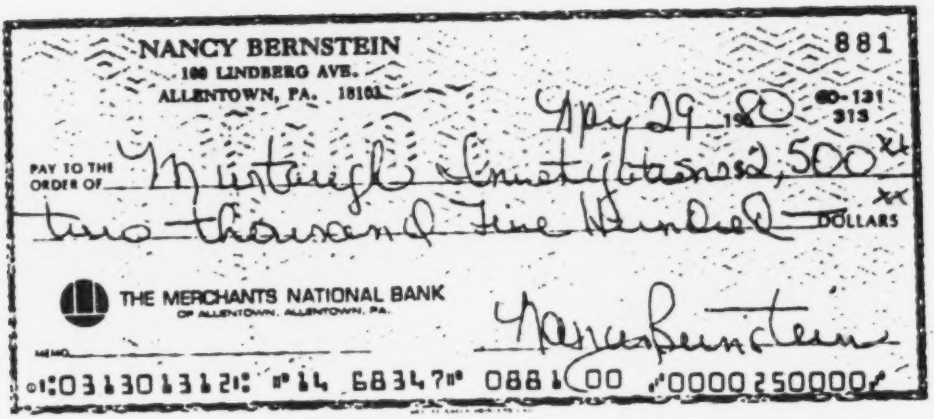
MNB MAY 27 1980 VALIDATED

THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO security

Nancy Bernstein

⑈03130131⑈ ⑈64 68347⑈ 0878 00 ⑈0000004000⑈


NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

881

May 29 1980 60-131 313

PAY TO THE ORDER OF Mountaintop Country Estates $2,500 XX

two thousand five hundred DOLLARS XX

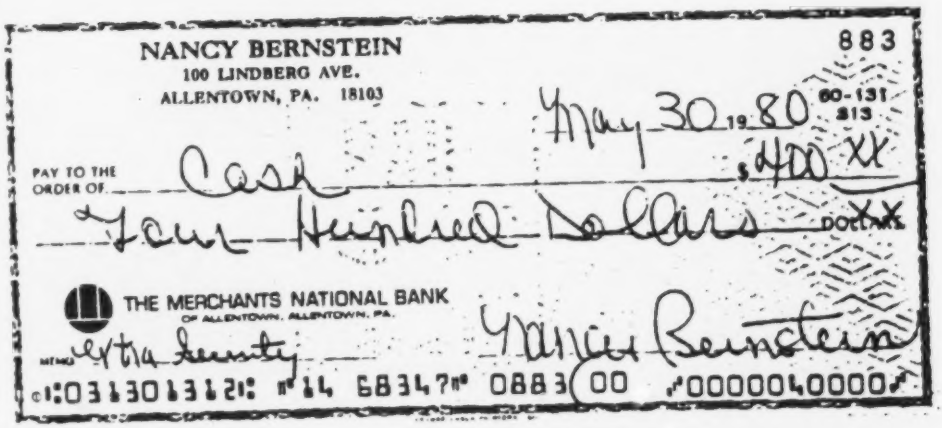
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆031301312⑆ ⑈14 68347⑈ 0881 00 ⑈0002500000⑈

37


NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

883

May 30 1980 60-131 313

PAY TO THE ORDER OF Cash $400 XX

four Hundred Dollars XX DOLLARS

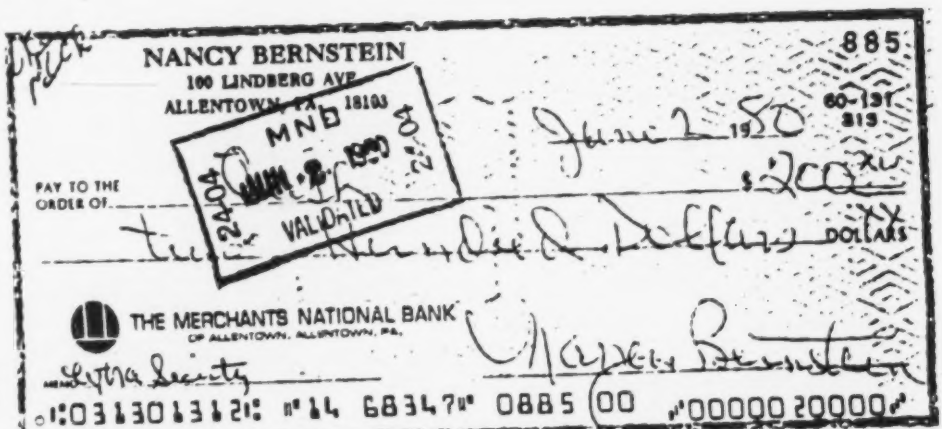
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO Extra Security

Nancy Bernstein

⑆031301312⑆ ⑈14 68347⑈ 0883 00 ⑈0000040000⑈

38


NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

MND

VALID ONLY

885

June 2 1980 60-131 313

PAY TO THE ORDER OF Cash $200 XX

two Hundred Dollars XX DOLLARS

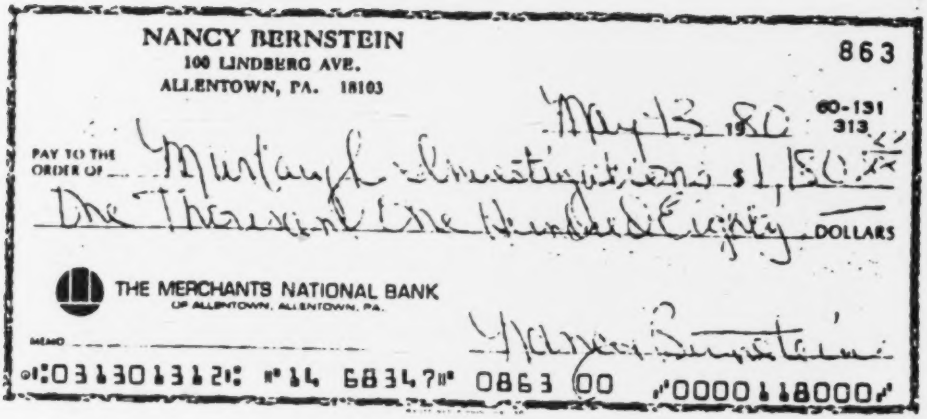
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO Extra Security

Nancy Bernstein

⑆031301312⑆ ⑈14 68347⑈ 0885 00 ⑈0000020000⑈

39



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

863

May 13 1980 60-131 313

PAY TO THE ORDER OF Mustangh Investigations $1,150.00

One Thousand One Hundred & Fifty DOLLARS

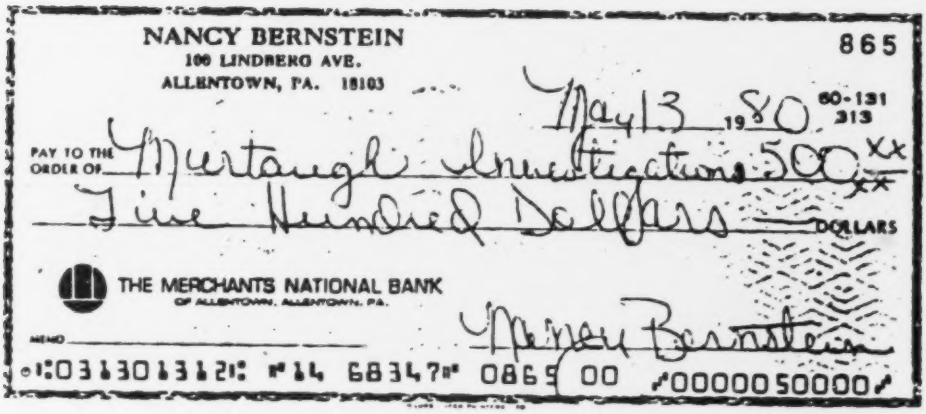
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆031301312⑆ ⑈14 68347⑈ 0863 00 ⑈000011800⑈

40



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

865

May 13 1980 60-131 313

PAY TO THE ORDER OF Mustangh Investigations 500.00

Five Hundred & Dollars DOLLARS

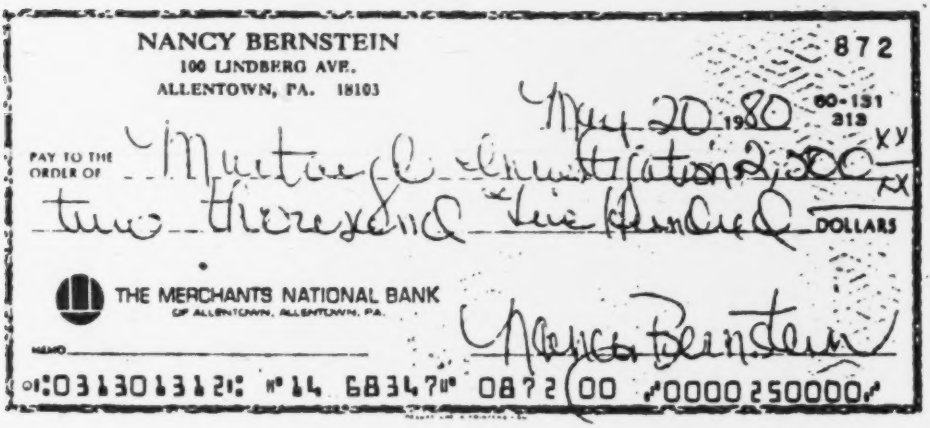
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆031301312⑆ ⑈14 68347⑈ 0865 00 ⑈000050000⑈

41



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

872

May 20 1980 60-131 313

PAY TO THE ORDER OF Mustangh Investigation 2,300.00

two thousand & five Hundred DOLLARS

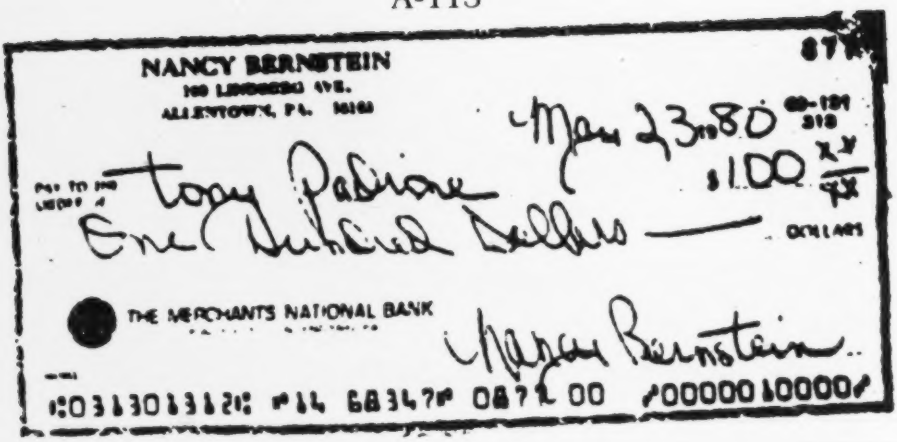
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆031301312⑆ ⑈14 68347⑈ 0872 00 ⑈000250000⑈

42



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

871

Mar 23 1980 60-131 313

PAY TO THE ORDER OF Tony Fabrizio $100.00 XX

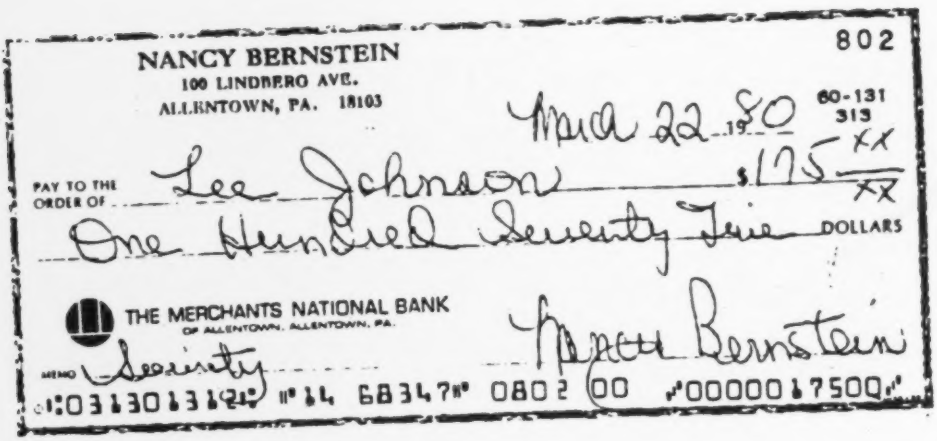
One Hundred Dollars —— DOLLARS

THE MERCHANTS NATIONAL BANK

Nancy Bernstein

⑈03130131⑆21⑈ ⑈14 68347⑈ 0871 00 ⑈00000 10000⑈

43



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

802

Mar 22 1980 60-131 313

PAY TO THE ORDER OF Lee Johnson $175.00 XX

One Hundred Seventy Five DOLLARS

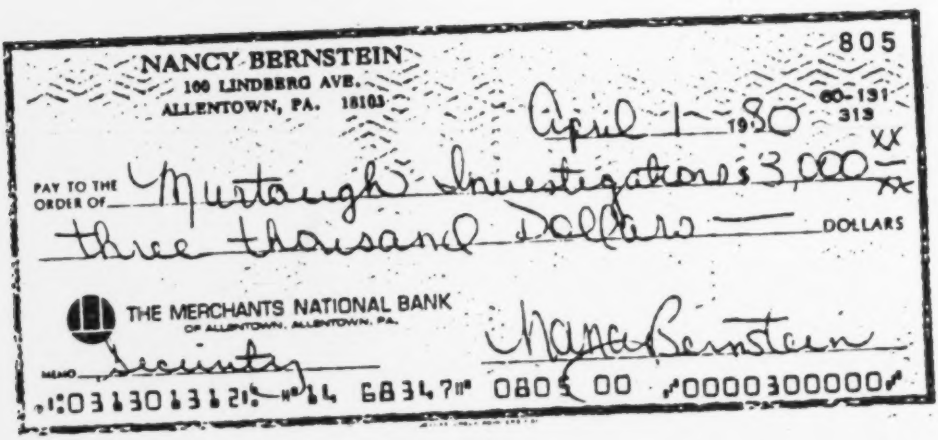
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO Security

Nancy Bernstein

⑈03130131⑆21⑈ ⑈14 68347⑈ 0802 00 ⑈00000 17500⑈

44



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

805

April 1 1980 60-131 313

PAY TO THE ORDER OF Murtaugh Investigations 3,000.00 XX

three thousand Dollars —— DOLLARS

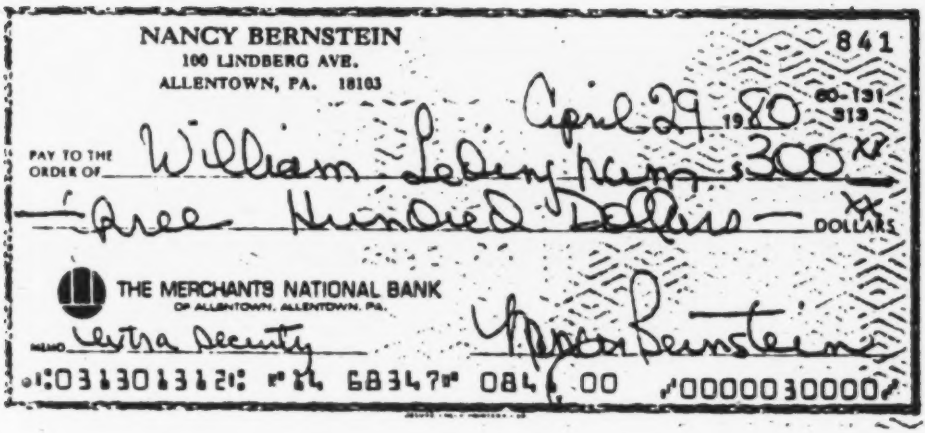
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO Security

Nancy Bernstein

⑈03130131⑆21⑈ ⑈14 68347⑈ 0805 00 ⑈00003 00000⑈

45



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

841

April 29 1980 60-131 313

PAY TO THE ORDER OF William Lederman $300 XX

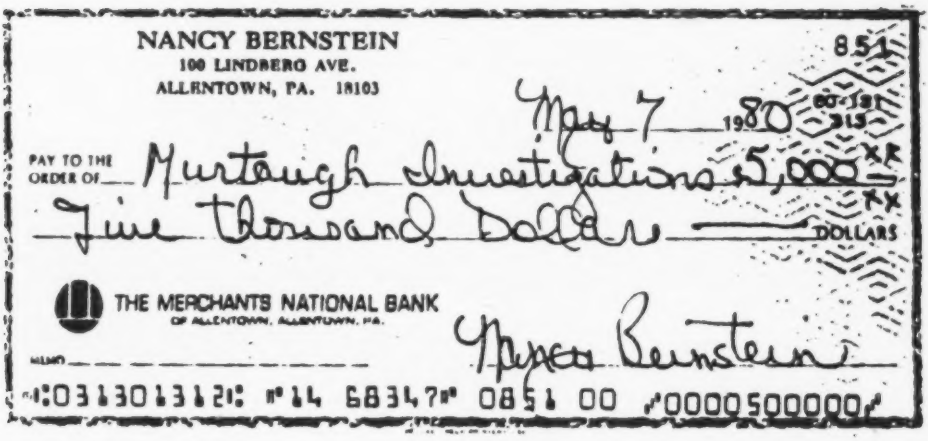
Three Hundred Dollars XX DOLLARS

THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO Extra Security

Nancy Bernstein

⑆031301312⑆ ⑈84 68347⑈ 0841 00 ⑈0000030000⑈



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

851

May 7 1980 60-131 313

PAY TO THE ORDER OF Murtaugh Investigations $5,000 XX

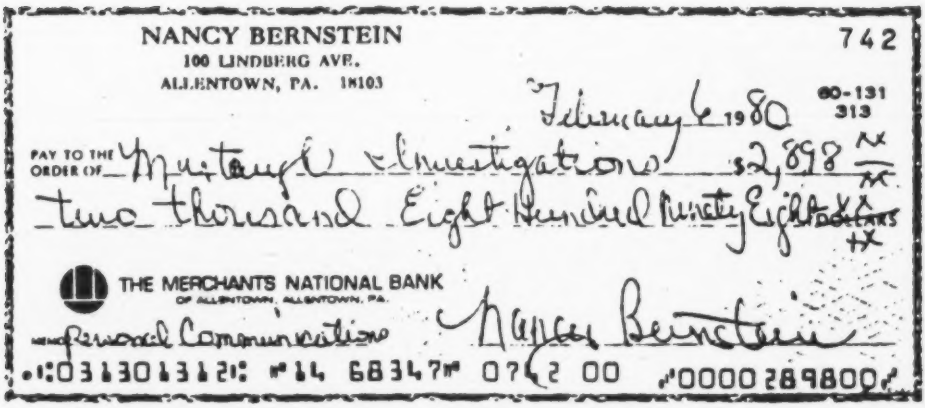
Five thousand Dollars XX DOLLARS

THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆031301312⑆ ⑈84 68347⑈ 0851 00 ⑈0000500000⑈



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

742

February 6 1980 60-131 313

PAY TO THE ORDER OF Murtaugh Investigations $2,898 XX

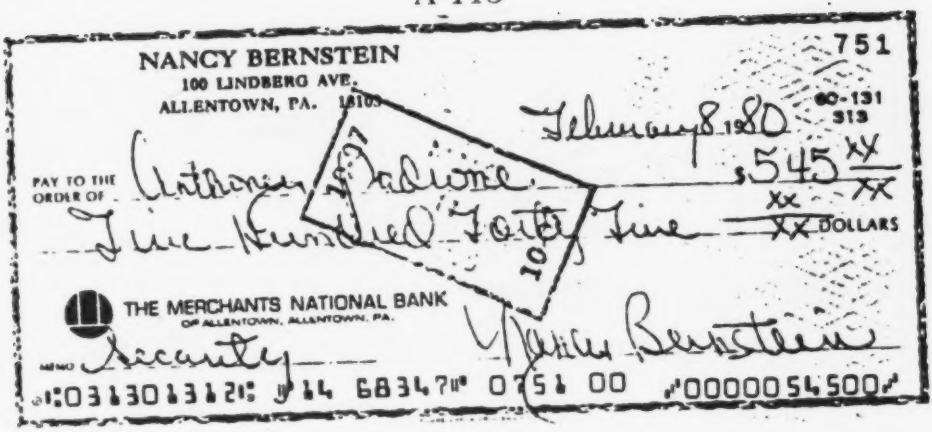
two thousand Eight Hundred Ninety Eight DOLLARS XX

THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO Personal Communications

Nancy Bernstein

⑆031301312⑆ ⑈84 68347⑈ 0742 00 ⑈0000289800⑈


NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

751

60-131
313

February 8 1980

PAY TO THE ORDER OF Anthony Padrone $545 XX

Five Hundred Forty Five XX DOLLARS

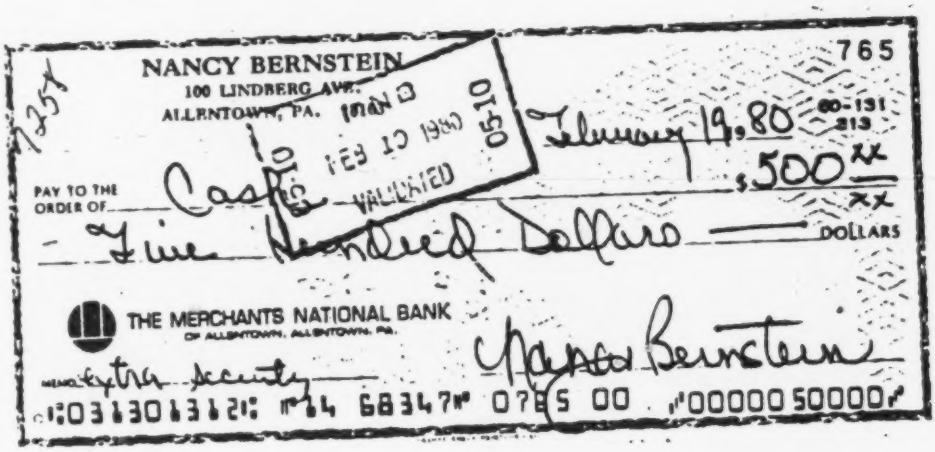
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO Security

Nancy Bernstein

⑆031301312⑆ 14 68347 0751 00 00000 54500

49


NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

765

60-131
313

February 19 1980

PAY TO THE ORDER OF Cash $500 XX

Five Hundred Dollars XX DOLLARS

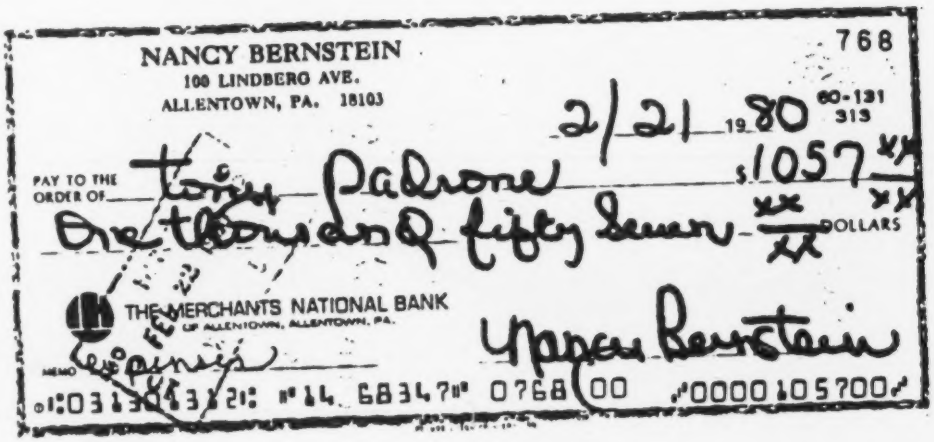
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO Extra Security

Nancy Bernstein

⑆031301312⑆ 14 68347 0765 00 00000 50000

50


NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

768

60-131
313

2/21 1980

PAY TO THE ORDER OF Tony Padrone $1057 XX

One thousand fifty seven XX DOLLARS

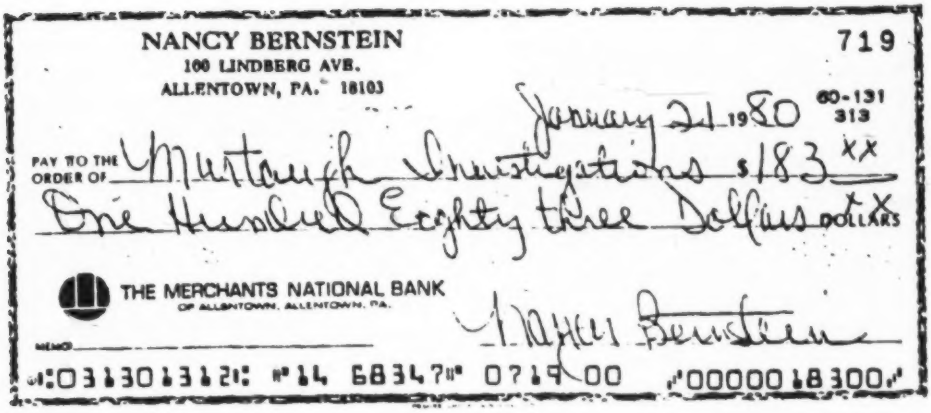
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO Expenses

Nancy Bernstein

⑆031301312⑆ 14 68347 0768 00 00000 105700

51



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

719

60-131
313

January 21 1980

PAY TO THE ORDER OF Murtaugh Investigations $183 XX

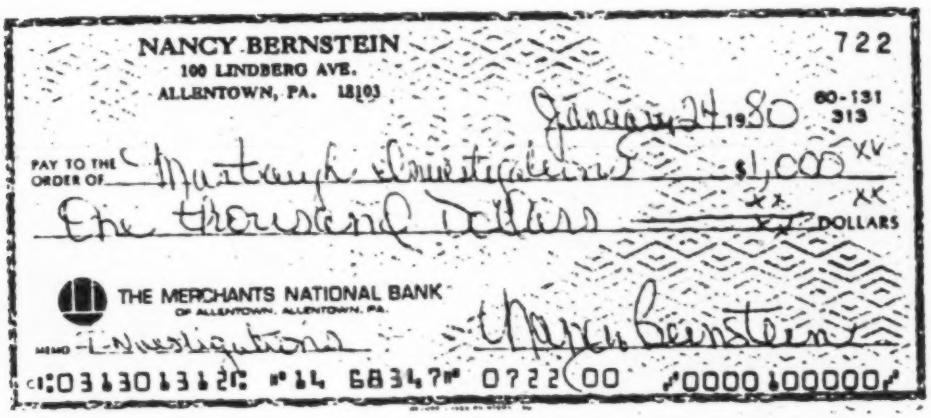
One Hundred Eighty three Dollars XX DOLLARS

THE MERCHANTS NATIONAL BANK
OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆03130631⑇ ⑈14 68347⑈ 0719 00 ⑈00000 18300⑈



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

722

60-131
313

January 24 1980

PAY TO THE ORDER OF Murtaugh Investigations $1,000 XX

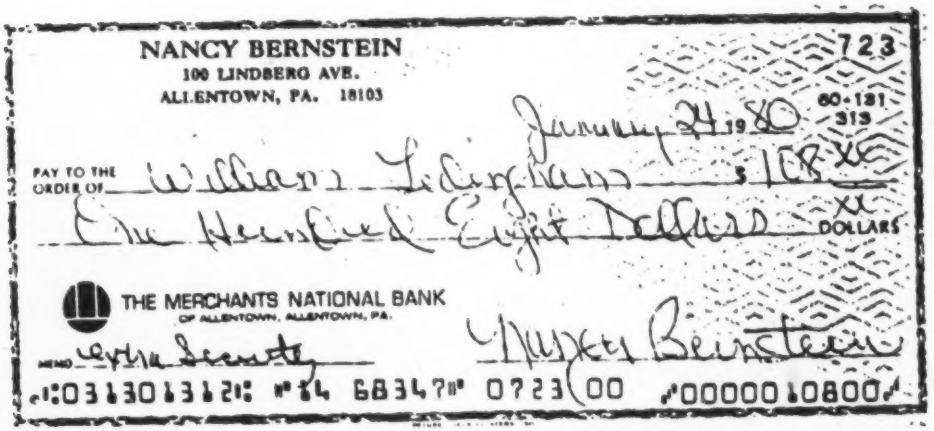
One thousand Dollars XX DOLLARS

THE MERCHANTS NATIONAL BANK
OF ALLENTOWN, ALLENTOWN, PA.

MEMO Investigations

Nancy Bernstein

⑆03130631⑇ ⑈14 68347⑈ 0722 00 ⑈0000 00000⑈



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

723

60-131
313

January 24 1980

PAY TO THE ORDER OF William Ledingham $108 XX

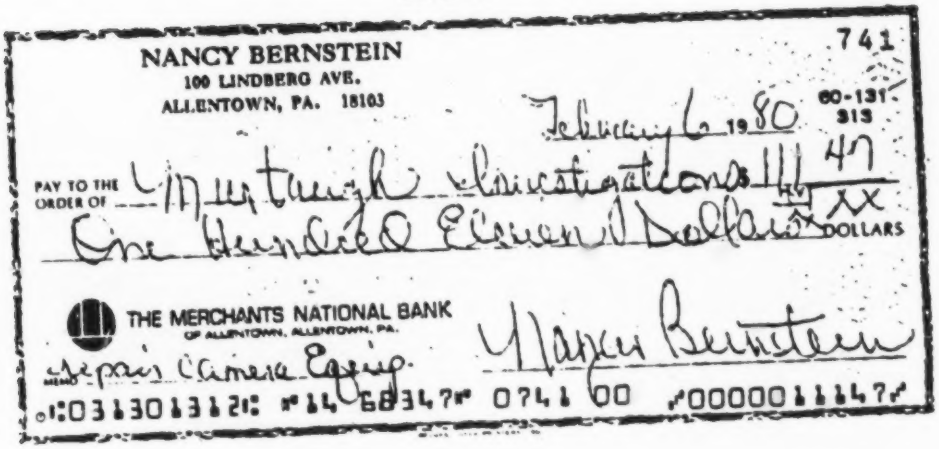
One Hundred Eight Dollars XX DOLLARS

THE MERCHANTS NATIONAL BANK
OF ALLENTOWN, ALLENTOWN, PA.

MEMO Cynthia Security

Nancy Bernstein

⑆03130631⑇ ⑈14 68347⑈ 0723 00 ⑈00000 10800⑈



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

741

February 6 1980

60-131
313

PAY TO THE ORDER OF Mountaintop Investigations 11/47 XX

One Hundred Eleven 11/47 DOLLARS

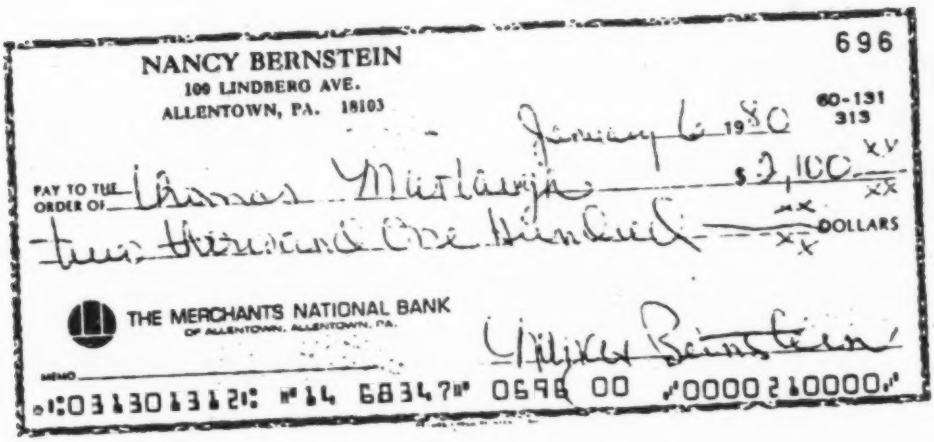
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO Depris Camera Equip.

Nancy Bernstein

⑆03130131⑇ ⑈14 68347⑈ 0741 00 ⑈000001147⑈

55



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

696

January 6 1980

60-131
313

PAY TO THE ORDER OF Thomas Mantanya $2,100 XX

two thousand One Hundred XX DOLLARS

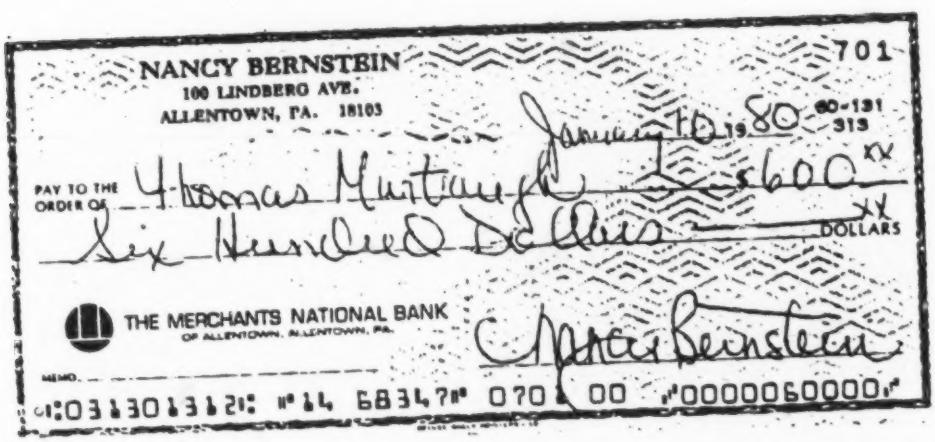
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆03130131⑇ ⑈14 68347⑈ 0696 00 ⑈000021000⑈

56



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

701

January 10 1980

60-131
313

PAY TO THE ORDER OF Thomas Mantanya $600 XX

Six Hundred & 00/100 DOLLARS

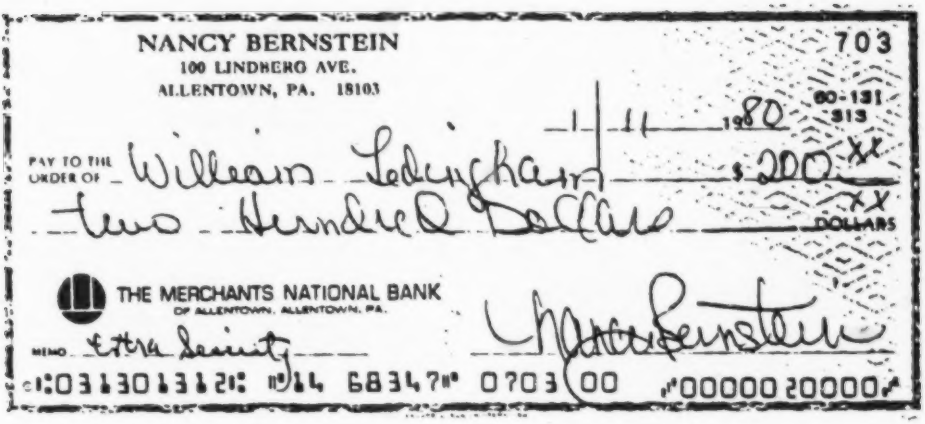
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆03130131⑇ ⑈14 68347⑈ 0701 00 ⑈000060000⑈

57



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

703

60-131
313

1/11 1980

PAY TO THE ORDER OF William Ledingham $ 200 XX

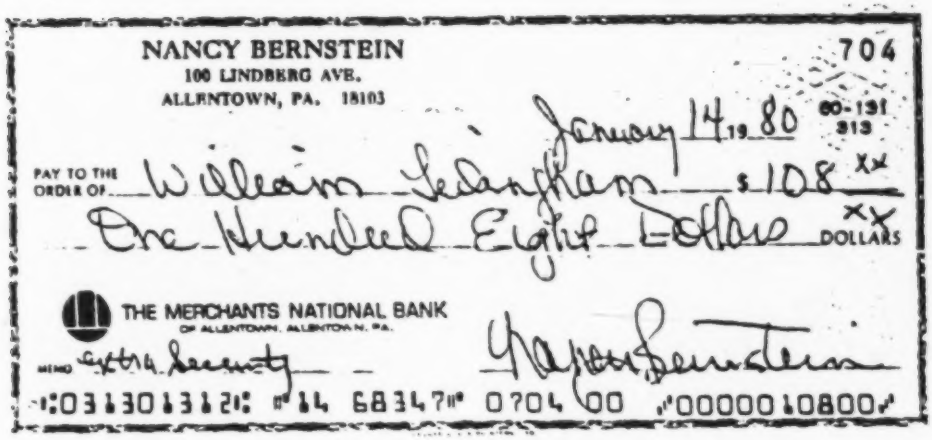
Two Hundred Dollars XX DOLLARS

THE MERCHANTS NATIONAL BANK
OF ALLENTOWN, ALLENTOWN, PA.

MEMO Extra Security

Nancy Bernstein

⑆031301312⑆ ⑈14 68347⑈ 0703 00 ⑈00000 20000⑈



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

704

60-131
313

January 14 1980

PAY TO THE ORDER OF William Ledingham $ 108 XX

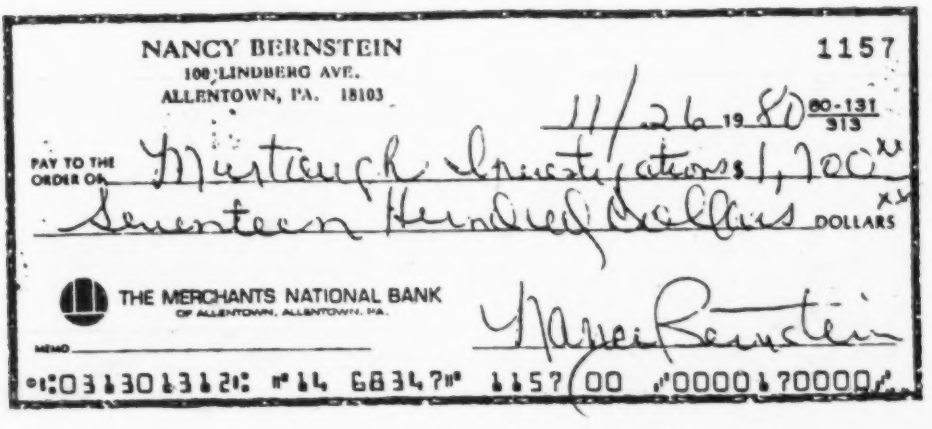
One Hundred Eight Dollars XX DOLLARS

THE MERCHANTS NATIONAL BANK
OF ALLENTOWN, ALLENTOWN, PA.

MEMO Extra Security

Nancy Bernstein

⑆031301312⑆ ⑈14 68347⑈ 0704 00 ⑈00001 0800⑈



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1157

60-131
313

11/26 1980

PAY TO THE ORDER OF Mortaugh Investigations $ 1,700 XX

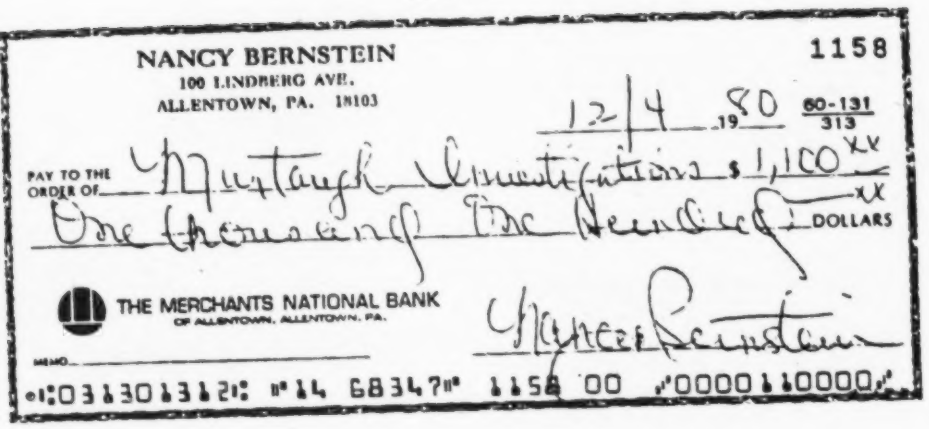
Seventeen Hundred Dollars XX DOLLARS

THE MERCHANTS NATIONAL BANK
OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆031301312⑆ ⑈14 68347⑈ 1157 00 ⑈0001 70000⑈



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1158

12/4 19 80 60-131/313

PAY TO THE ORDER OF Mentaugh Investigations $ 1,100 XX

One thousand One Hundred XX DOLLARS

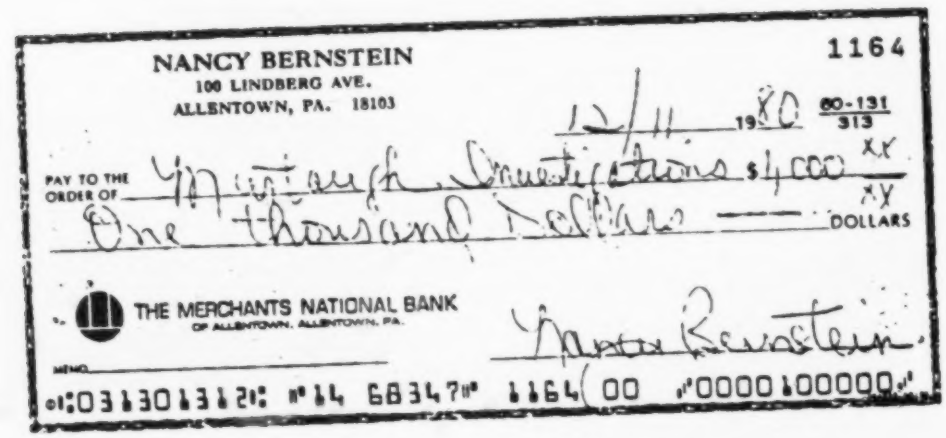
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

Nancy Bernstein

MEMO

⑆031301312⑆ ⑈14 68347⑈ 1158 00 ⑈0000110000⑈

61



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1164

12/11 19 80 60-131/313

PAY TO THE ORDER OF Mentaugh Investigations $ 4,000 XX

One thousand Dollars XX DOLLARS

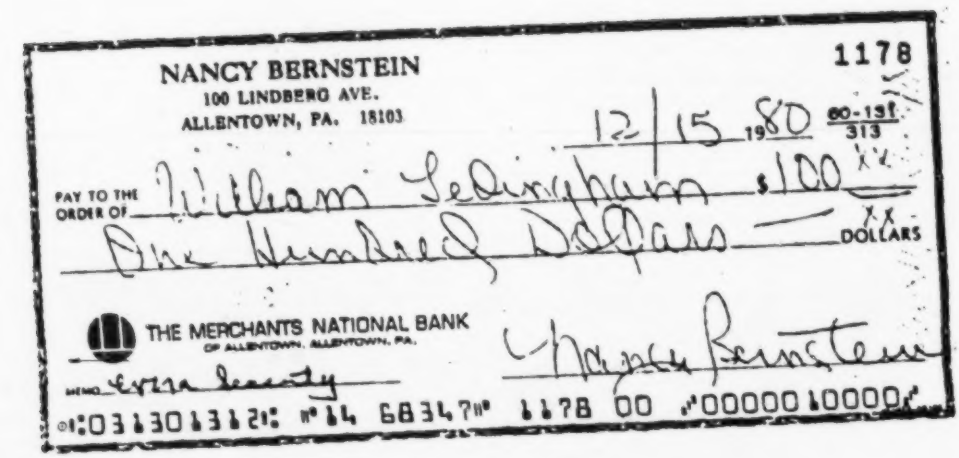
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

Nancy Bernstein

MEMO

⑆031301312⑆ ⑈14 68347⑈ 1164 00 ⑈0000400000⑈

62



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1178

12/15 19 80 60-131/313

PAY TO THE ORDER OF William Lehighton $ 100 XX

One Hundred Dollars XX DOLLARS

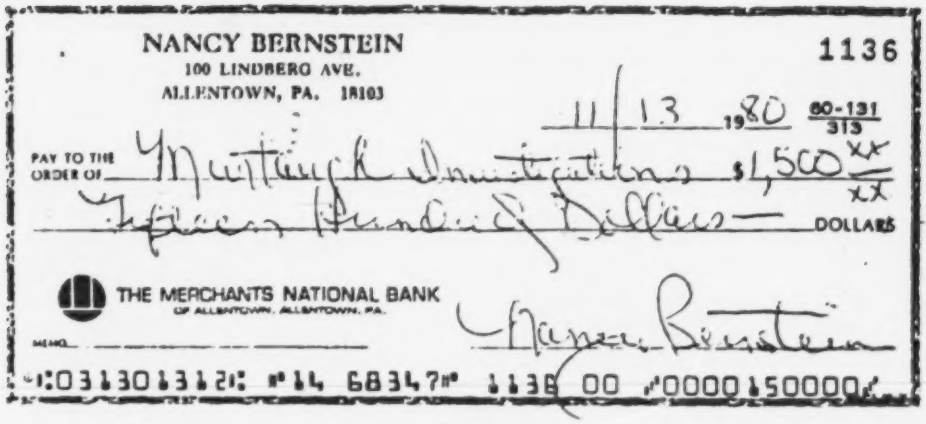
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

Nancy Bernstein

MEMO Extra Security

⑆031301312⑆ ⑈14 68347⑈ 1178 00 ⑈0000010000⑈

63



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1136

11/13 19 80 60-131/313

PAY TO THE ORDER OF Muntaugh Investigations $1,500 XX/XX

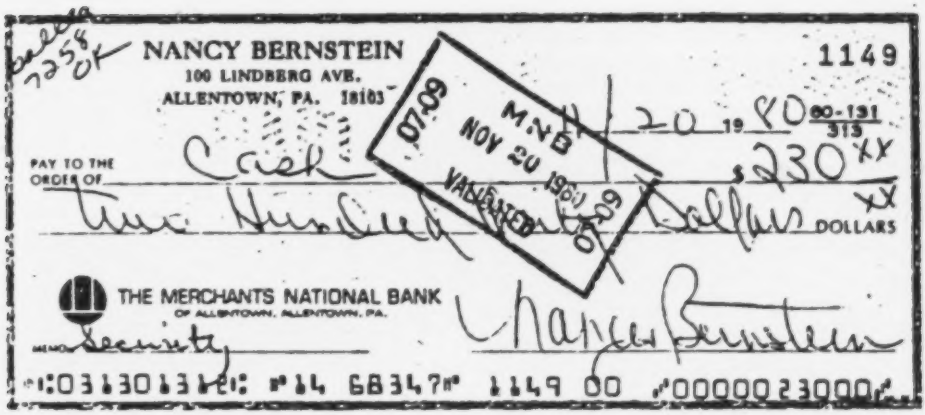
Fifteen Hundred & Dollars DOLLARS

THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆031301312⑆ ⑈14 68347⑈ 1136 00 ⑈000015000⑈



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1149

7258 OK

07-09 M&B NOV 20 1980 VALLEYSTOWN 05-29

11/20 19 80 60-131/313

PAY TO THE ORDER OF Cash $230 XX/XX

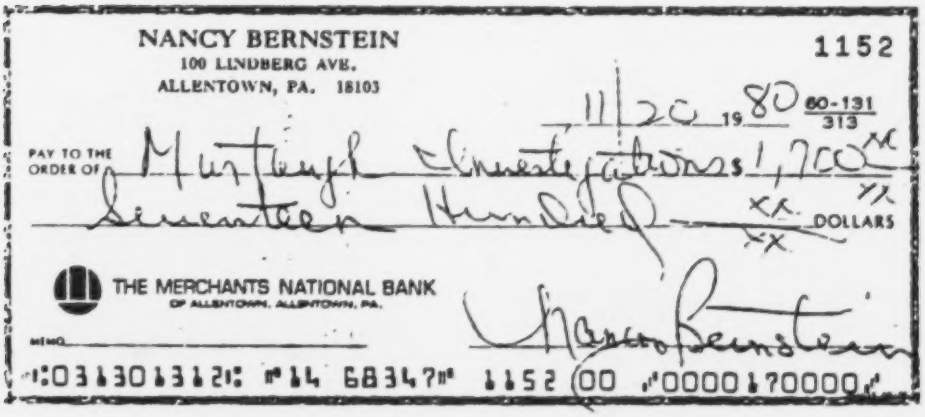
Two Hundred Thirty & Dollars DOLLARS

THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO Security

Nancy Bernstein

⑆031301312⑆ ⑈14 68347⑈ 1149 00 ⑈000023000⑈



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1152

11/20 19 80 60-131/313

PAY TO THE ORDER OF Muntaugh Investigations $1,700 XX/XX

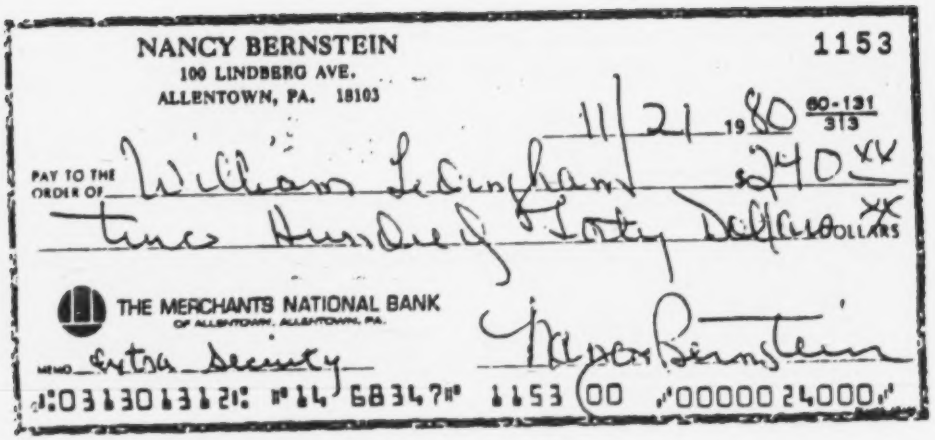
Seventeen Hundred & DOLLARS

THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆031301312⑆ ⑈14 68347⑈ 1152 00 ⑈000017000⑈



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1153

11/21 1980 60-131/313

PAY TO THE ORDER OF William LeLinghan $240 XX

Two Hundred Forty Dollars XX DOLLARS

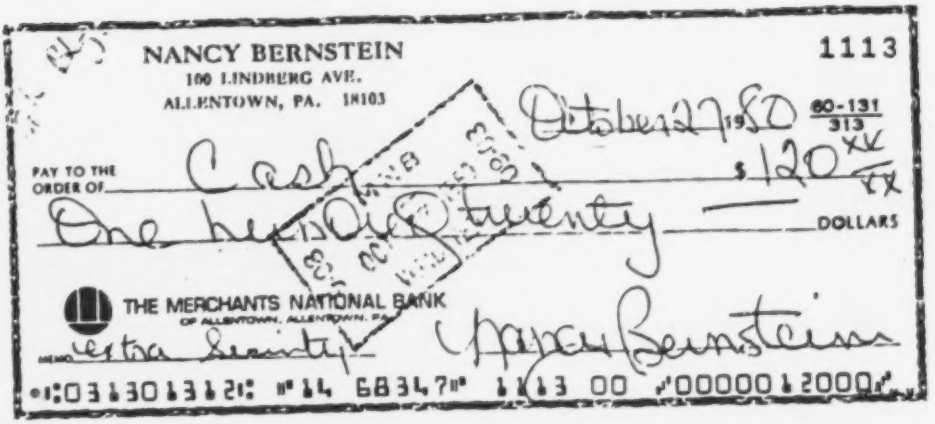
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO Extra Security

Myra Bernstein

⑆03130131⑇ ⑈14 68347⑈ 1153 00 ⑈00000 24000⑈

67



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1113

October 27 1980 60-131/313

PAY TO THE ORDER OF Cash $120 XX

One hundred twenty XX DOLLARS

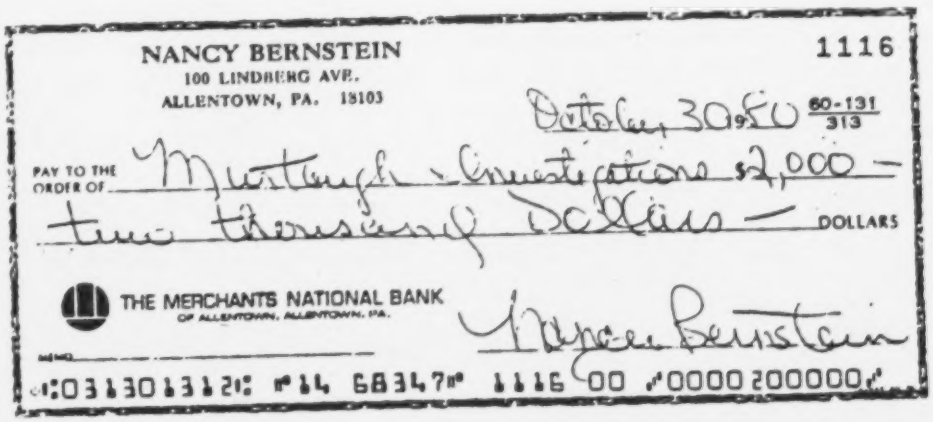
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO extra security

Myra Bernstein

⑆03130131⑇ ⑈14 68347⑈ 1113 00 ⑈00000 12000⑈

68



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1116

October 30 1980 60-131/313

PAY TO THE ORDER OF Mentaugh - Investigations $2,000 —

two thousand Dollars — DOLLARS

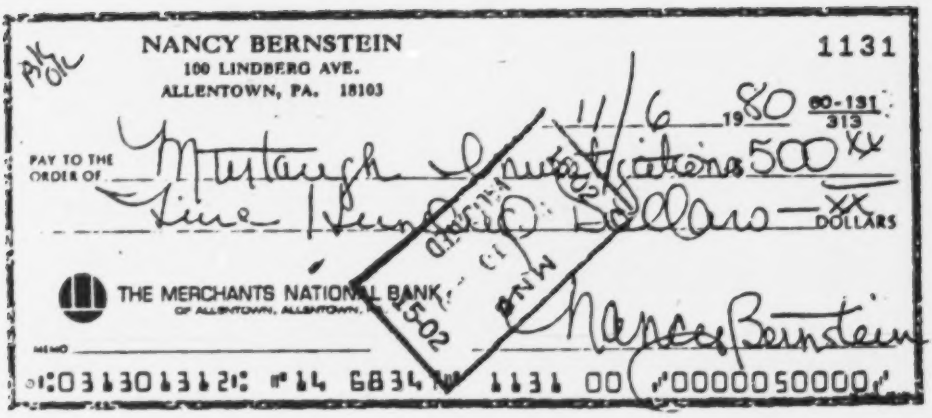
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Myra Bernstein

⑆03130131⑇ ⑈14 68347⑈ 1116 00 ⑈0000 200000⑈

69



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1131

11/6 1980 60-131/313

PAY TO THE ORDER OF Mustaugh Investigations 500 XX

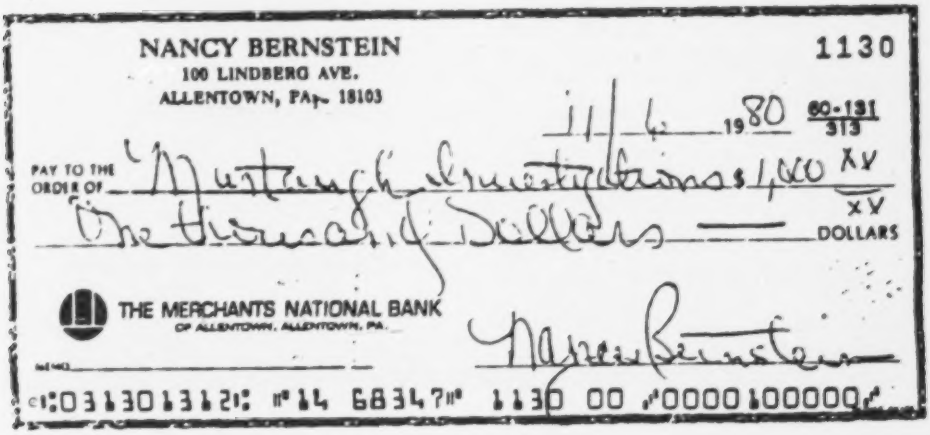
Five Hundred Dollars — XX DOLLARS

THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆031301312⑆ ⑈64 68347⑈ 1131 00 ⑈000050000⑈



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1130

11/4 1980 60-131/313

PAY TO THE ORDER OF Mustaugh Investigations $1,000 XX

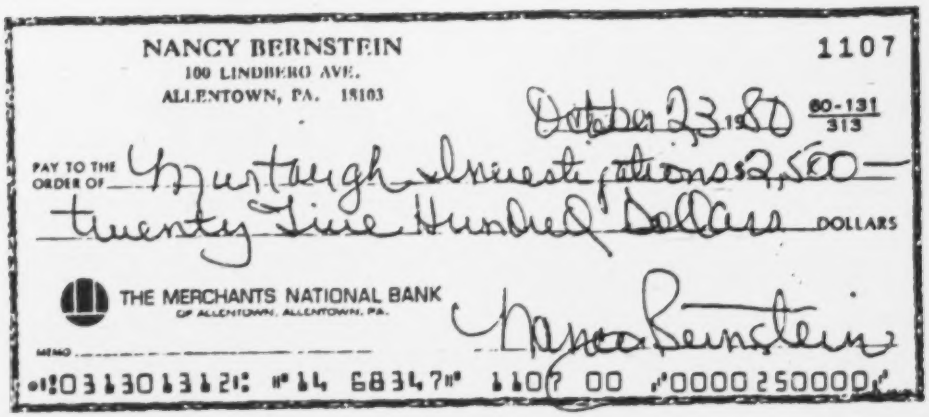
One thousand Dollars — XX DOLLARS

THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆031301312⑆ ⑈64 68347⑈ 1130 00 ⑈000100000⑈



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1107

October 23 1980 60-131/313

PAY TO THE ORDER OF Mustaugh Investigations $2,500 —

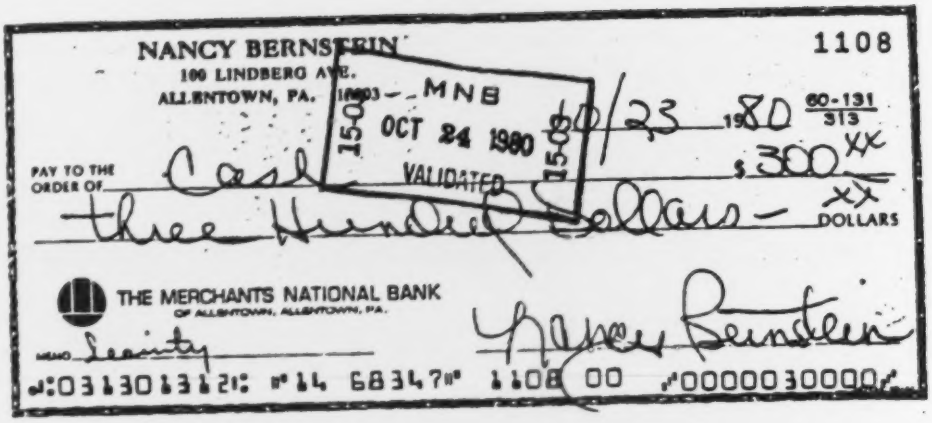
twenty five Hundred Dollars DOLLARS

THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

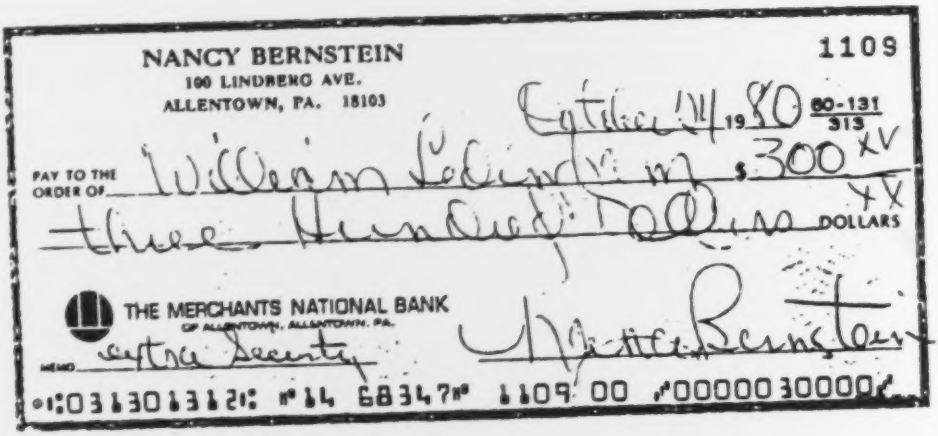
MEMO

Nancy Bernstein

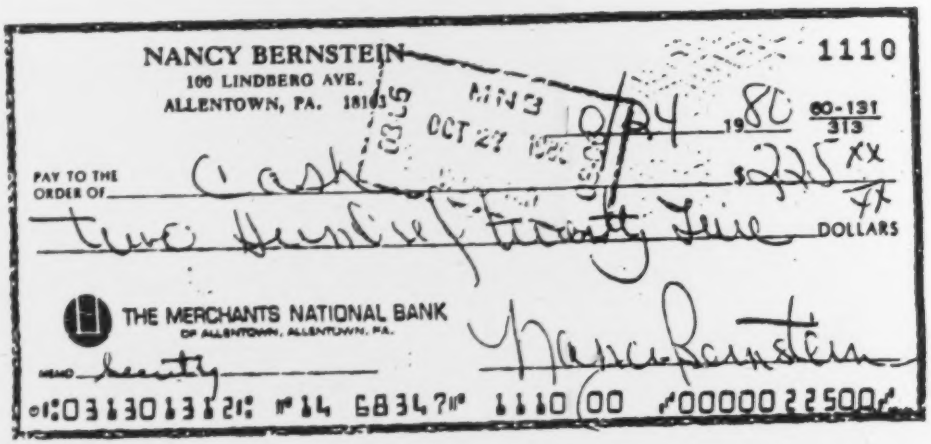
⑆031301312⑆ ⑈64 68347⑈ 1107 00 ⑈000250000⑈


NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103
1108
MNB
OCT 24 1980
VALIDATED
10/23 1980 60-131/313
PAY TO THE ORDER OF Cash $300 XX
three Hundred Dollars XX DOLLARS
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.
MEMO Security
Nancy Bernstein
⑆03130131⑆ 11 68347 1108 00 00000030000

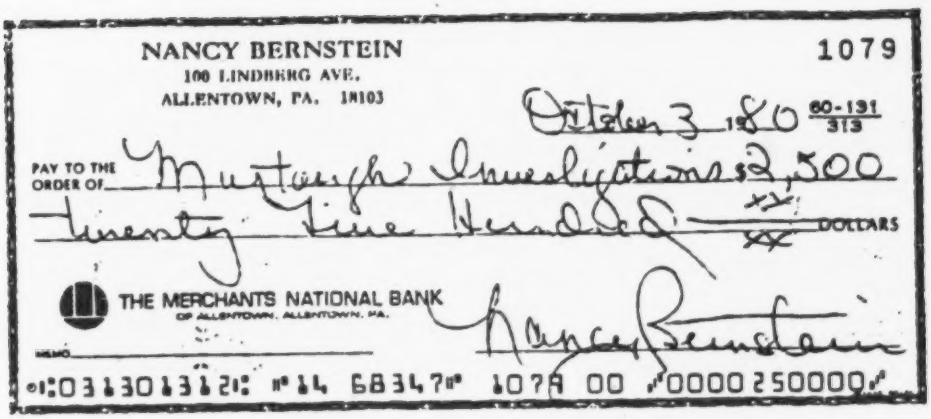
73


NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103
1109
October 24 1980 60-131/313
PAY TO THE ORDER OF William Lodinsky $300 XX
three Hundred Dollars XX DOLLARS
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.
MEMO extra Security
Nancy Bernstein
⑆03130131⑆ 11 68347 1109 00 00000030000

74


NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103
1110
MNB
OCT 27
10/24 1980 60-131/313
PAY TO THE ORDER OF Cash $225 XX
two Hundred Twenty Five XX DOLLARS
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.
MEMO Security
Nancy Bernstein
⑆03130131⑆ 11 68347 1110 00 00000022500

75



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1079

October 3 1980 60-131/313

PAY TO THE ORDER OF Murtaugh Investigations $2,500

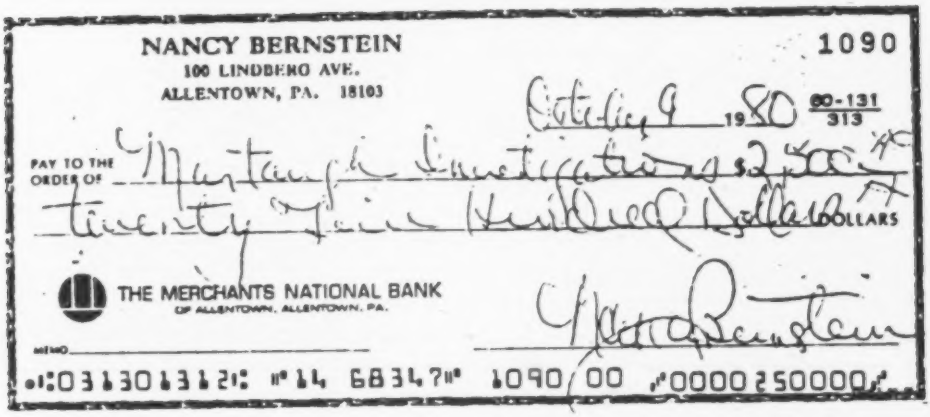
twenty five Hundred XX DOLLARS

THE MERCHANTS NATIONAL BANK
OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆03130131⑆21⑆ ⑈14 68347⑈ 1079 00 ⑈0000250000⑈



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1090

October 9 1980 60-131/313

PAY TO THE ORDER OF Murtaugh Investigations $2,500 XX

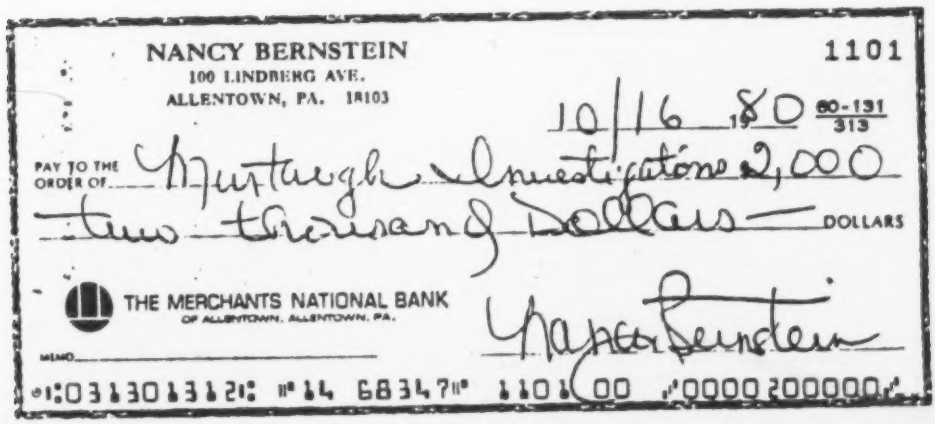
twenty five Hundred Dollars XX DOLLARS

THE MERCHANTS NATIONAL BANK
OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆03130131⑆21⑆ ⑈14 68347⑈ 1090 00 ⑈0000250000⑈



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1101

10/16 1980 60-131/313

PAY TO THE ORDER OF Murtaugh Investigations $2,000

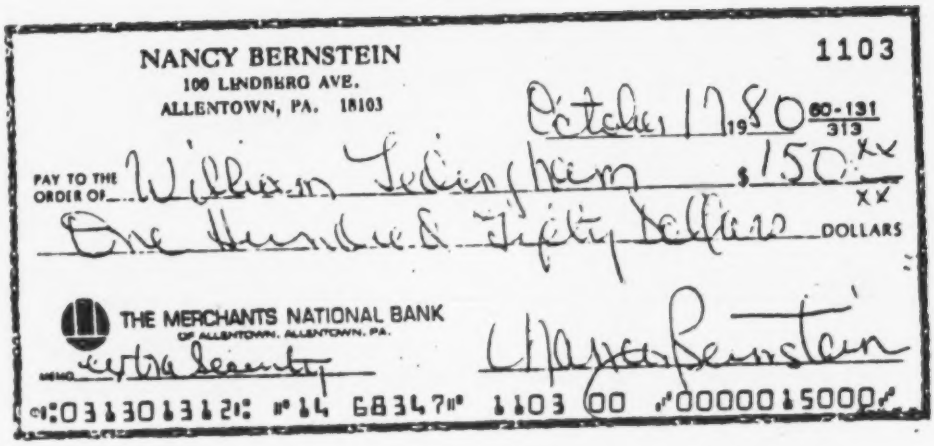
two thousand Dollars DOLLARS

THE MERCHANTS NATIONAL BANK
OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆03130131⑆21⑆ ⑈14 68347⑈ 1101 00 ⑈0000200000⑈



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1103

October 17 1980 60-131/313

PAY TO THE ORDER OF William Teicingham $150.00 XX

One Hundred & Fifty Dollars DOLLARS

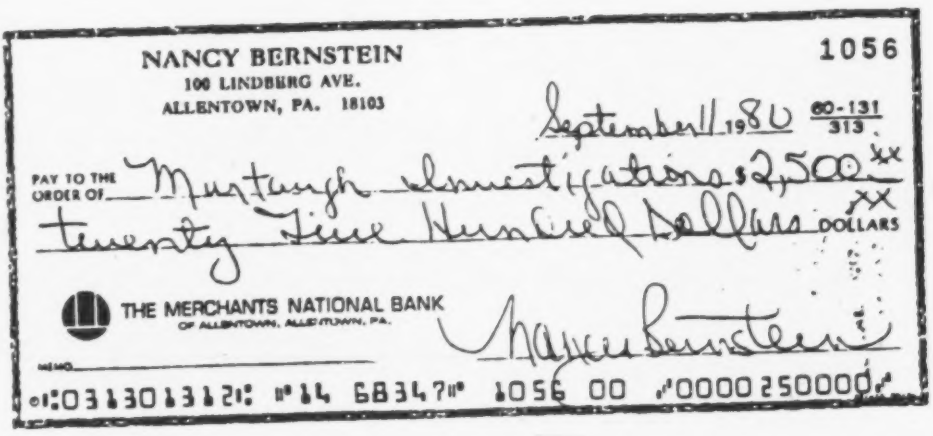
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO extra security

Nancy Bernstein

⑆031301321⑆ ⑈14 68347⑈ 1103 00 ⑈00001 5000⑈

79



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1056

September 11 1980 60-131/313

PAY TO THE ORDER OF Mustaugh Investigations $2,500.00 XX

twenty five Hundred Dollars DOLLARS

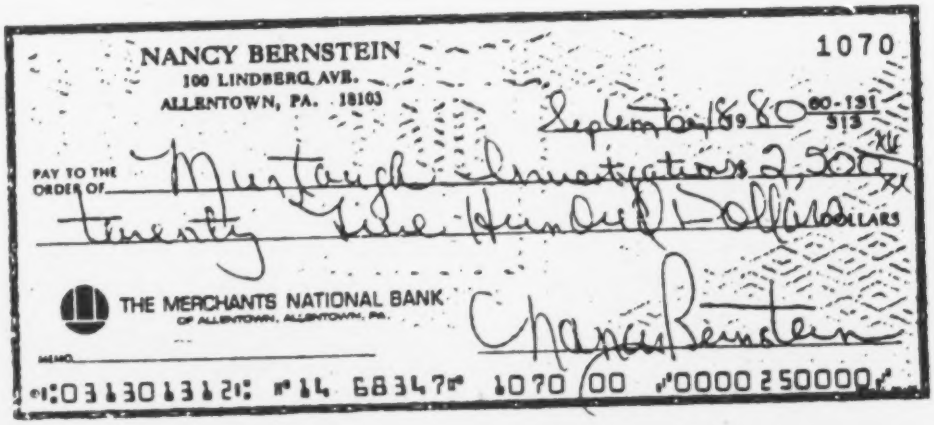
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆031301321⑆ ⑈14 68347⑈ 1056 00 ⑈00002 5000⑈

80



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1070

September 18 1980 60-131/313

PAY TO THE ORDER OF Mustaugh Investigations $2,500.00 XX

twenty five Hundred Dollars DOLLARS

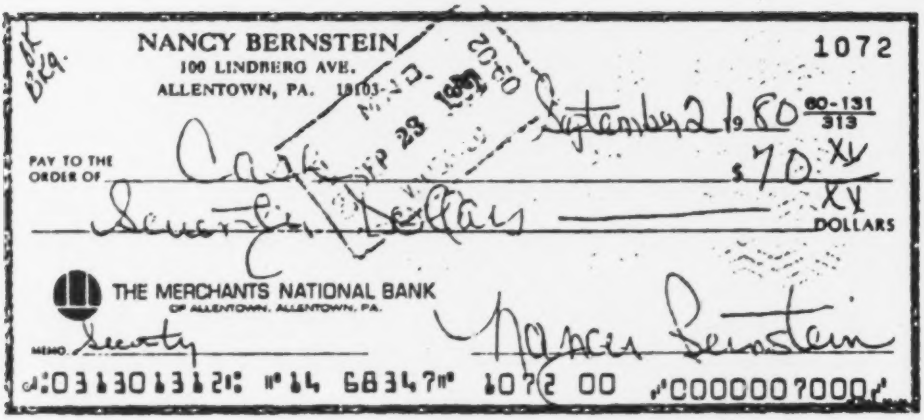
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆031301321⑆ ⑈14 68347⑈ 1070 00 ⑈00002 5000⑈

81



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1072

September 21 80 60-131/313

PAY TO THE ORDER OF Cash $70 XX

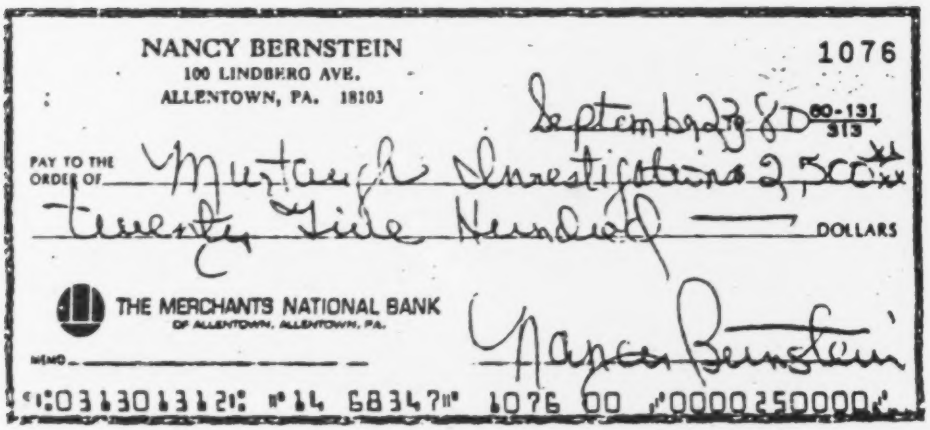
Seventy Dollars XX DOLLARS

THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO Security

Nancy Bernstein

⑆:03130131 21⑆ 11 68347 11 1072 00 "000000 7000"



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1076

September 23 80 60-131/313

PAY TO THE ORDER OF Murtaugh Investigations 2,500 XX

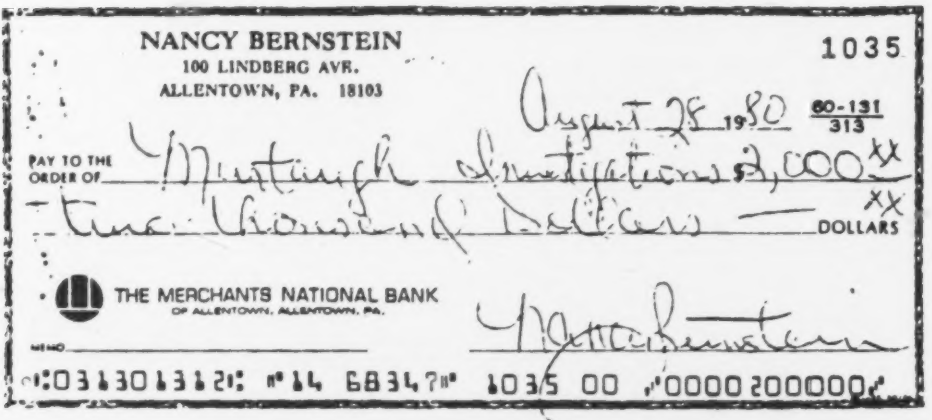
twenty five Hundred XX DOLLARS

THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆:03130131 21⑆ 11 68347 11 1076 00 "0000250000"



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1035

August 25 80 60-131/313

PAY TO THE ORDER OF Murtaugh Investigations $3,000 XX

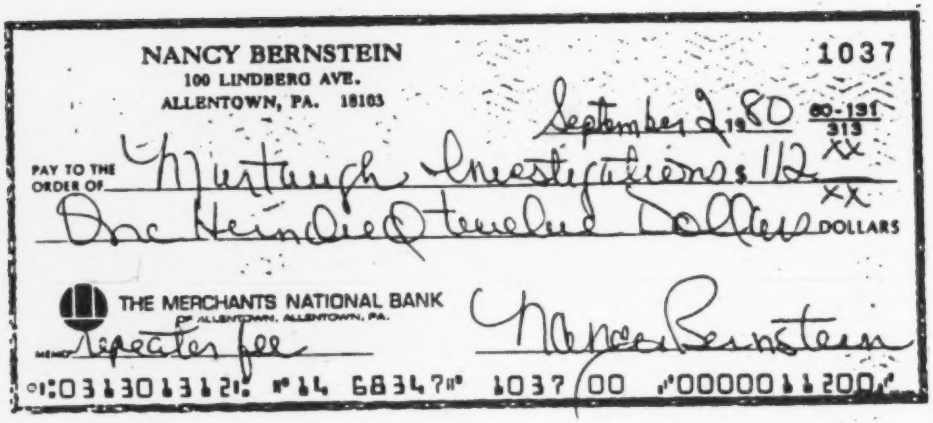
three thousand Dollars XX DOLLARS

THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆:03130131 21⑆ 11 68347 11 1035 00 "0000200000"



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1037

September 2, 1980 60-131/313

PAY TO THE ORDER OF Mustaugh Investigations $ 112 XX

One Hundred & twelve and Dollars XX DOLLARS

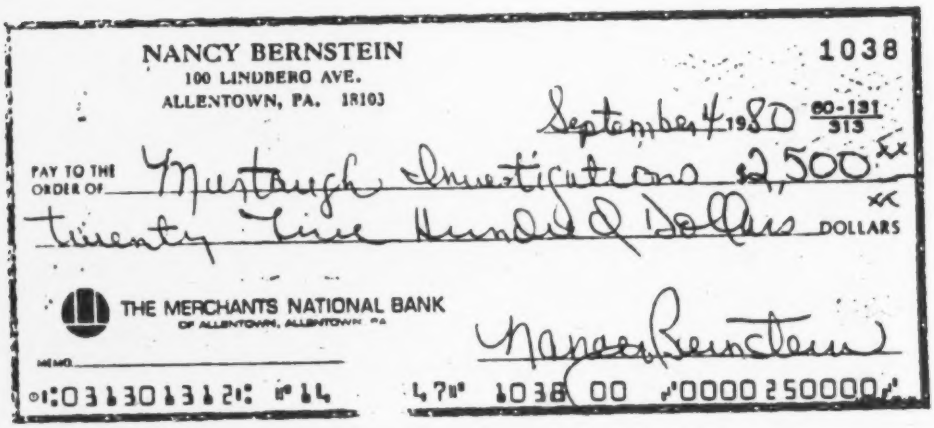
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO Repeater fee

Nancy Bernstein

⑆031301316⑆ 11 64 68347 1037 00 0000011200

85



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1038

September 4, 1980 60-131/313

PAY TO THE ORDER OF Mustaugh Investigations $2,500 XX

twenty five Hundred & Dollars XX DOLLARS

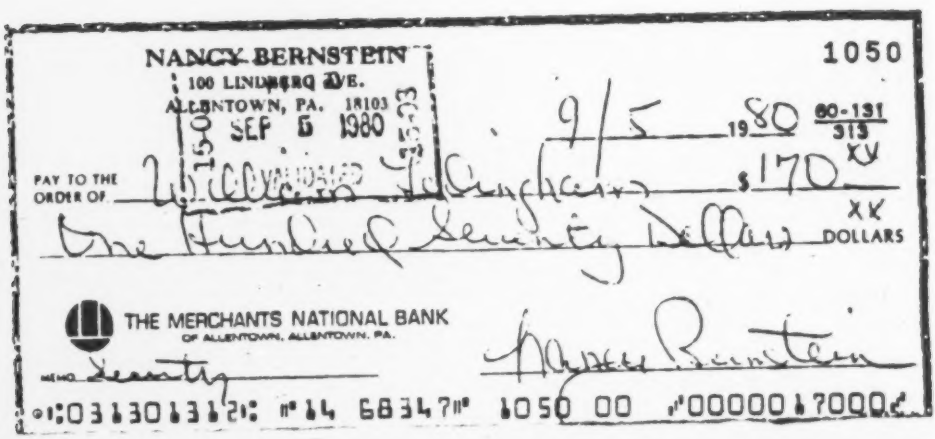
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆031301316⑆ 11 64 47 1038 00 0000250000

86



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

SEP 5 1980

1050

9/5 1980 60-131/313

PAY TO THE ORDER OF Whitman Teichner $ 170 XX

One Hundred & Seventy Dollars XX DOLLARS

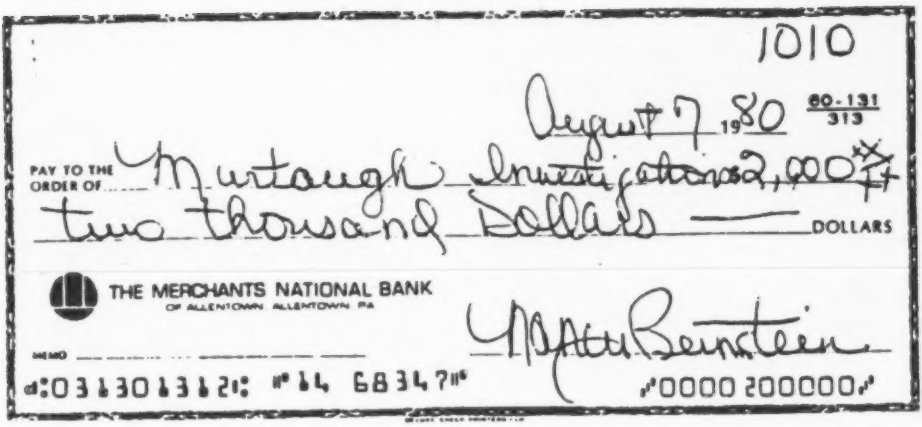
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO Security

Nancy Bernstein

⑆031301316⑆ 11 64 68347 1050 00 0000017000

87



1010

August 7 1980 80-131/313

PAY TO THE ORDER OF Murtaugh Investigations 2,000 XX

two thousand Dollars — DOLLARS

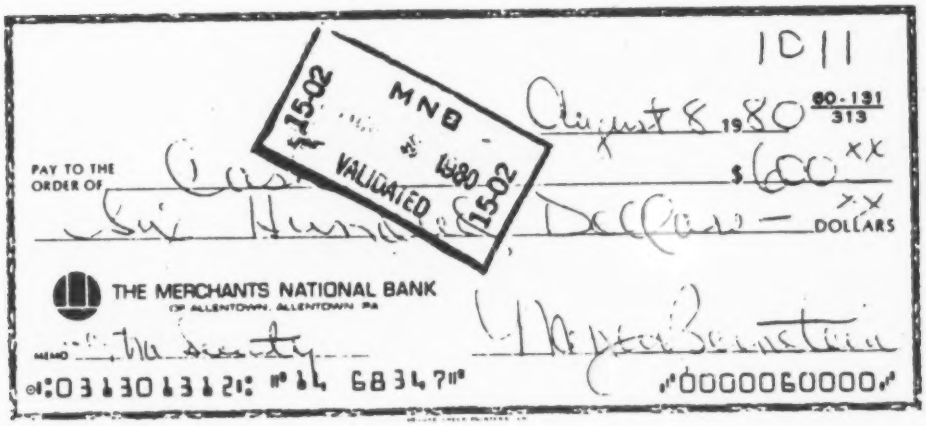
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA

MEMO

Nancy Bernstein

⑆03130131⑆ 11 68347 11 "0000200000"

88



1011

August 8 1980 80-131/313

PAY TO THE ORDER OF [illegible] $600 XX

[illegible] DOLLARS

MNB 1502 VALIDATED 1502

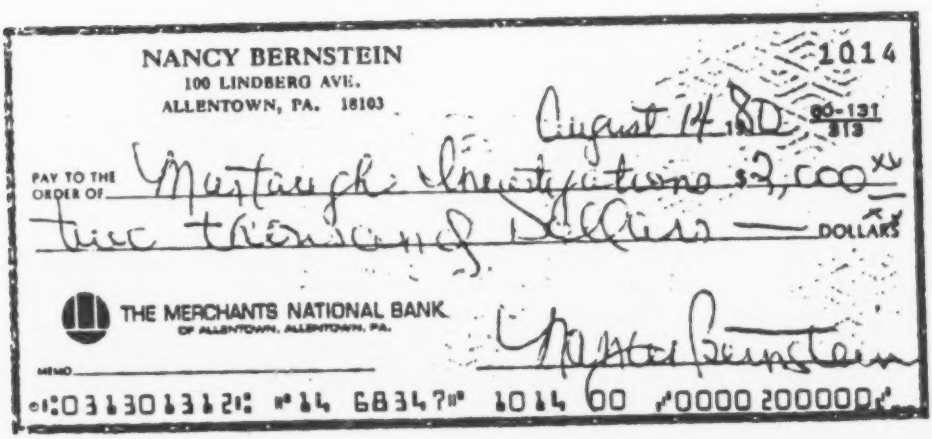
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA

MEMO [illegible]

Nancy Bernstein

⑆03130131⑆ 11 68347 11 "0000060000"

89



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1014

August 14 1980 80-131/313

PAY TO THE ORDER OF Murtaugh Investigations $2,000 XX

two thousand Dollars — DOLLARS

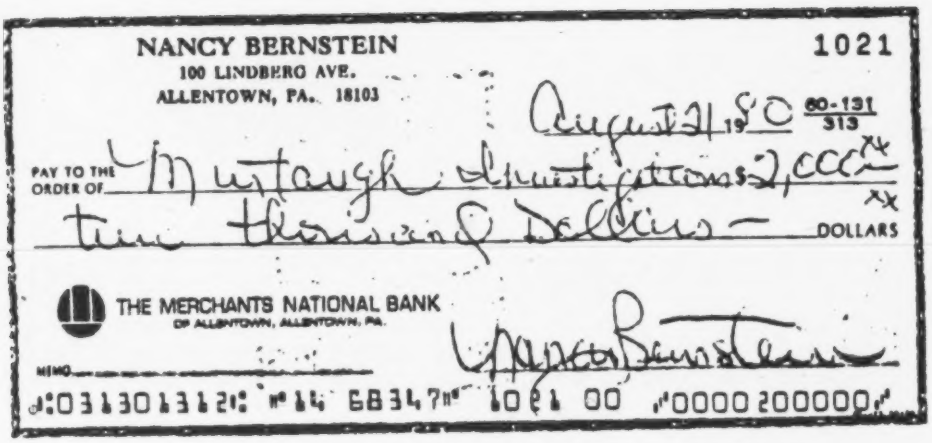
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆03130131⑆ 11 68347 11 1014 00 "0000200000"

90



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1021

August 21 19 80 60-131 313

PAY TO THE ORDER OF Murtaugh Investigations $2,000 XX

two thousand & Dollars — XX DOLLARS

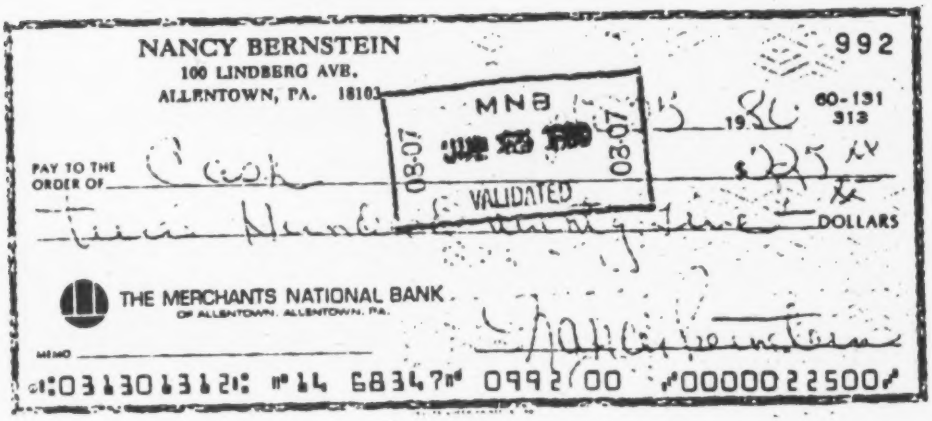
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆031301312⑆ ⑈1021 68347⑈ 1021 00 ⑈0000200000⑈

91



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

992

MNB 08-07 VALIDATED 08-07

5 19 80 60-131 313

PAY TO THE ORDER OF Cash $225 XX

two hundred twenty-five — XX DOLLARS

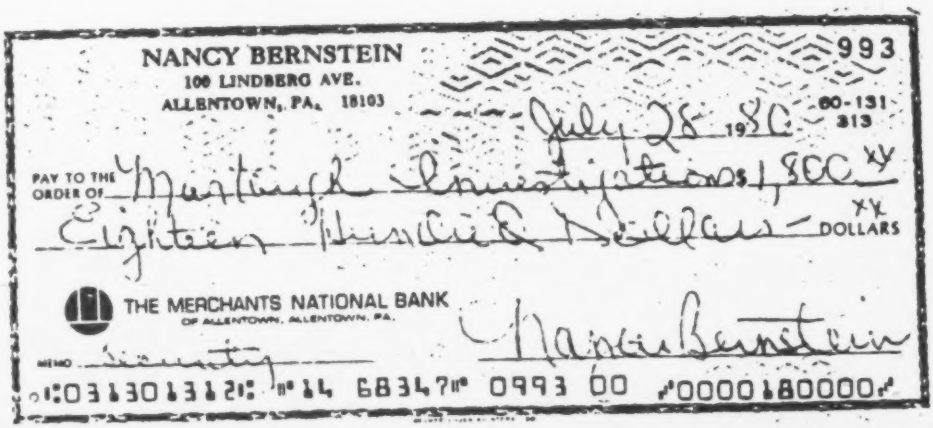
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆031301312⑆ ⑈1021 68347⑈ 0992 00 ⑈0000022500⑈

92



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

993

July 28 19 80 60-131 313

PAY TO THE ORDER OF Murtaugh Investigations $1,800 XX

Eighteen Hundred & Dollars — XX DOLLARS

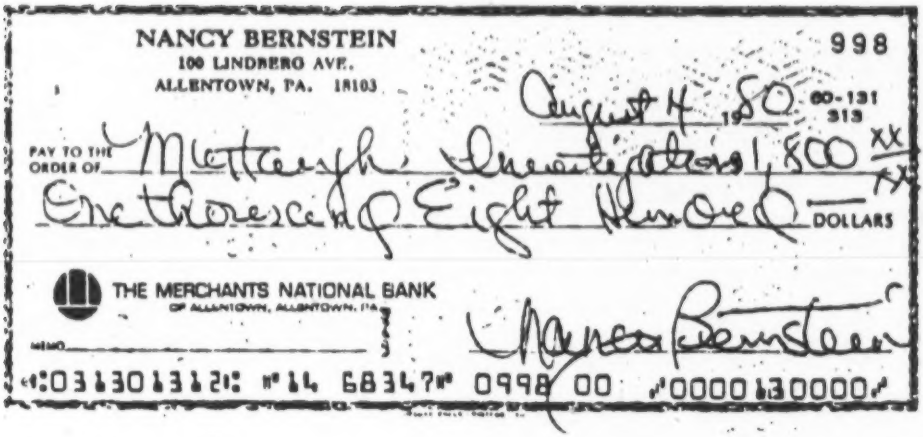
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO Security

Nancy Bernstein

⑆031301312⑆ ⑈1021 68347⑈ 0993 00 ⑈0000180000⑈

93


NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

998

August 4 1980 60-131 313

PAY TO THE ORDER OF Mortgage Investors 1,800 XX

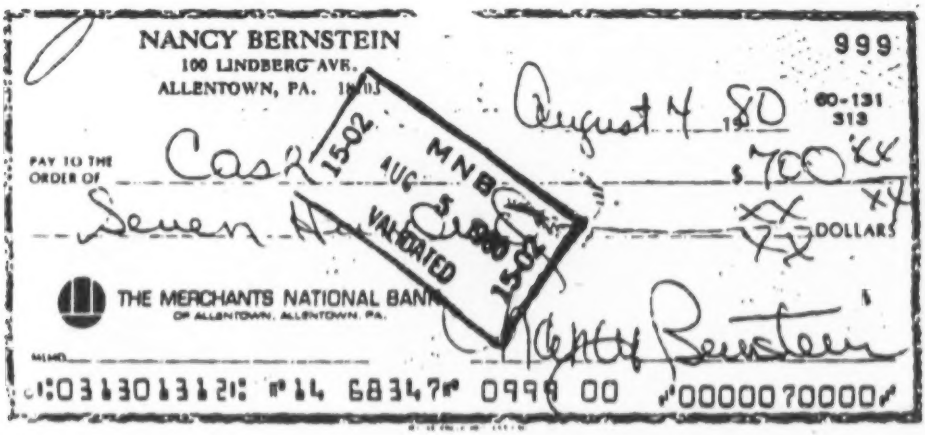
One Thousand Eight Hundred XX DOLLARS

THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆:031301312⑆ ⑈14 68347⑈ 0998 00 ⑈0000180000⑈


NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

999

August 4 1980 60-131 313

PAY TO THE ORDER OF Cash $700 XX

Seven Hundred XX DOLLARS

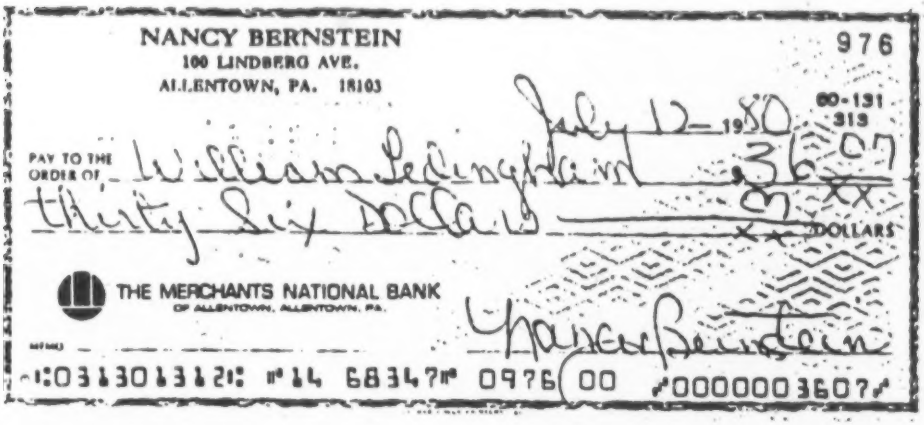
1502 AUG MNB VALIDATED 1502

THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆:031301312⑆ ⑈14 68347⑈ 0999 00 ⑈0000070000⑈


NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

976

July 12 1980 60-131 313

PAY TO THE ORDER OF William Ledingham $36.07

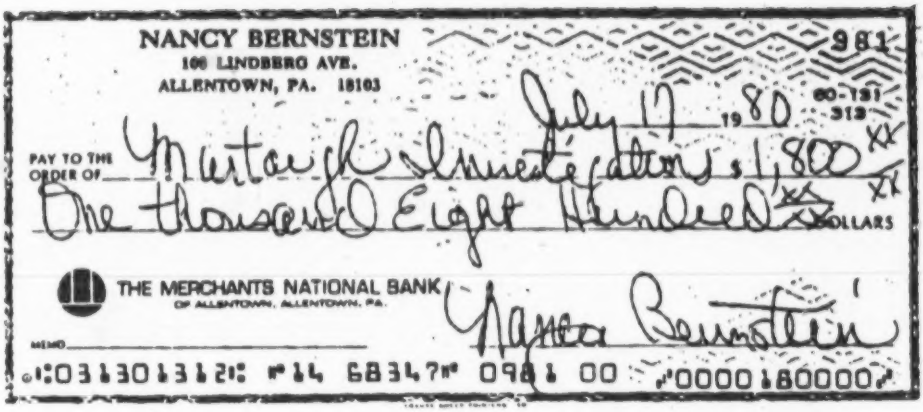
thirty six DOLLARS 07 XX

THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆:031301312⑆ ⑈14 68347⑈ 0976 00 ⑈0000003607⑈



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

981

July 17 1980 60-131 313

PAY TO THE ORDER OF Mertaugh Investigations $1,800 XX

One thousand Eight Hundred XX DOLLARS

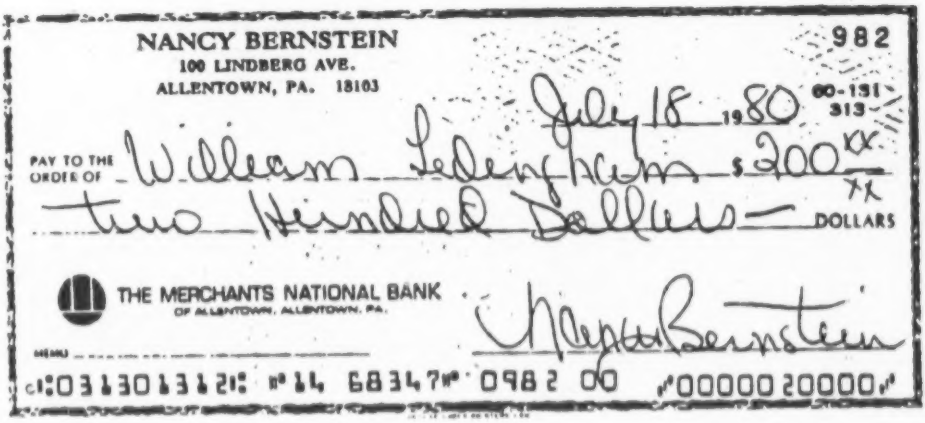
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

Nancy Bernstein

MEMO

⑆031301312⑆ 11 68347 0981 00 0000180000

97



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

982

July 18 1980 60-131 313

PAY TO THE ORDER OF William Lederingham $200 XX

two Hundred Dollars XX DOLLARS

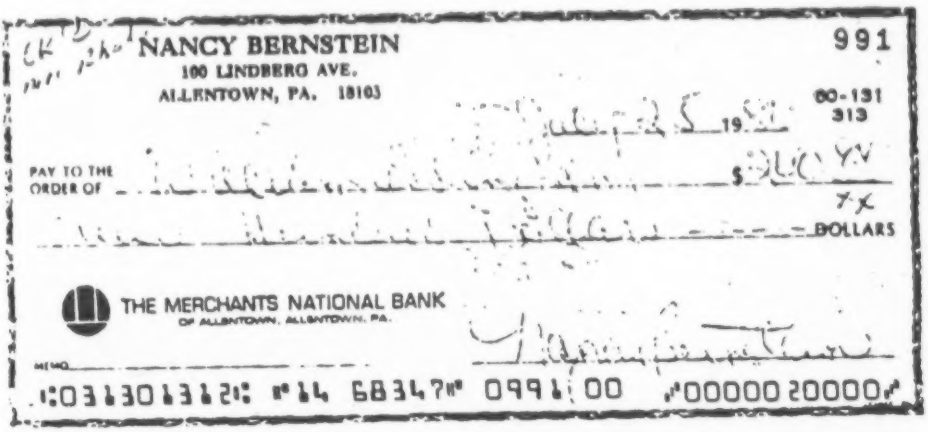
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

Nancy Bernstein

MEMO

⑆031301312⑆ 11 68347 0982 00 00000 20000

98



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

991

60-131 313

PAY TO THE ORDER OF $ XX

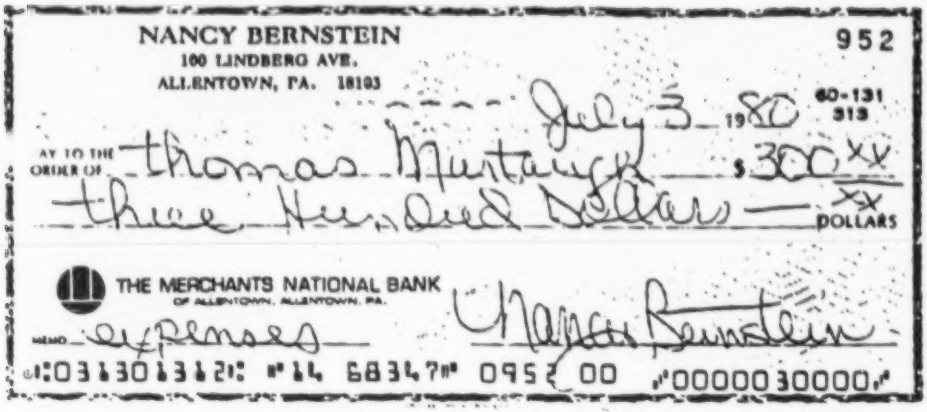
DOLLARS

THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO

⑆031301312⑆ 11 68347 0991 00 00000 20000

99



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

952

60-131
313

July 3 1980

PAY TO THE ORDER OF Thomas Muntaugh $ 300 XX

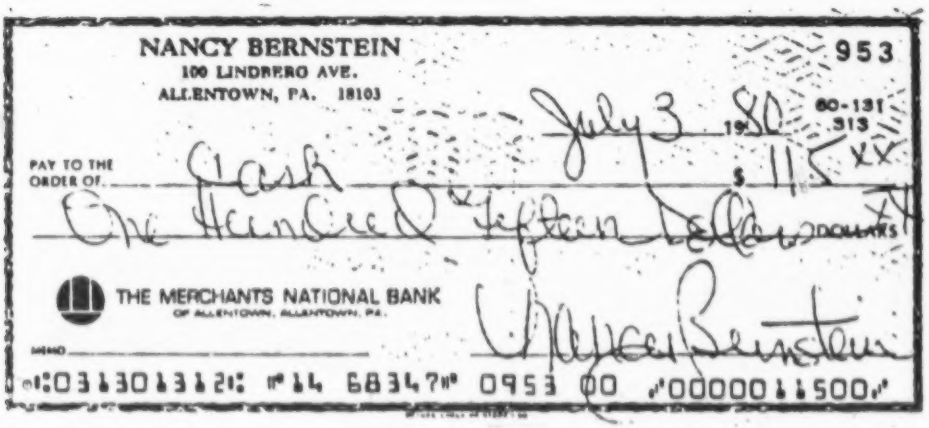
three Hundred Dollars XX DOLLARS

THE MERCHANTS NATIONAL BANK
OF ALLENTOWN, ALLENTOWN, PA.

MEMO expenses

Nancy Bernstein

⑆031301312⑆ ⑈14 68347⑈ 0952 00 ⑈000030000⑈



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

953

60-131
313

July 3 1980

PAY TO THE ORDER OF Cash $ 115 XX

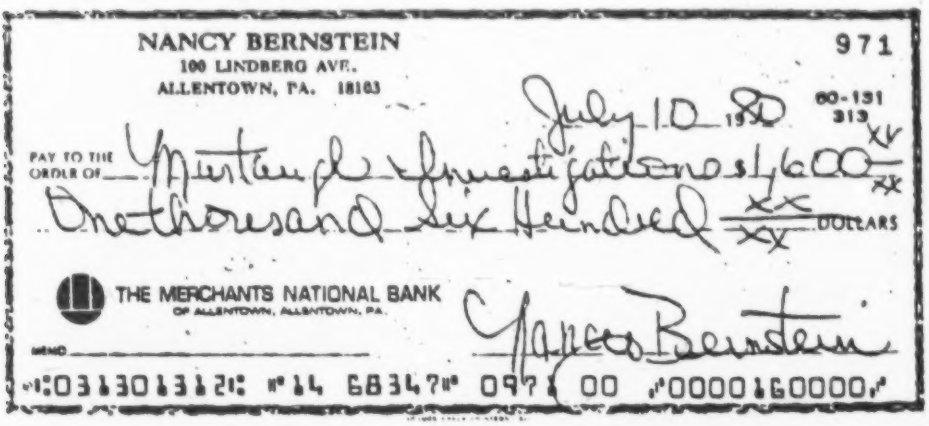
One Hundred & fifteen Dollars XX DOLLARS

THE MERCHANTS NATIONAL BANK
OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆031301312⑆ ⑈14 68347⑈ 0953 00 ⑈000011500⑈



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

971

60-131
313

July 10 1980

PAY TO THE ORDER OF Muntaugh Investigations $ 1,600 XX

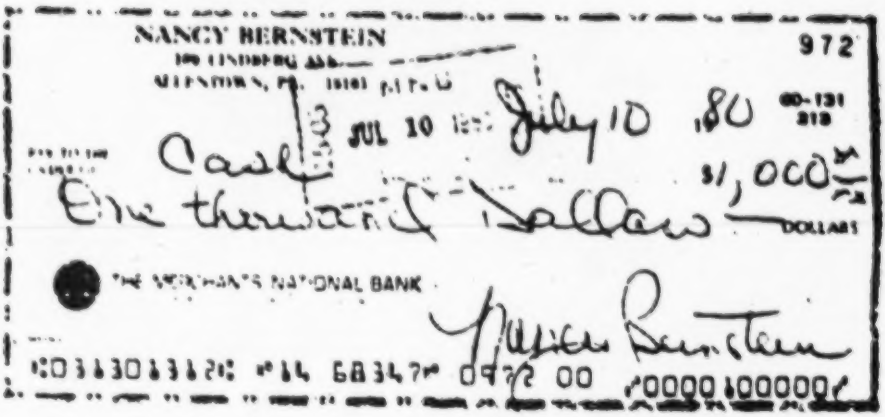
One thousand six Hundred XX DOLLARS

THE MERCHANTS NATIONAL BANK
OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆031301312⑆ ⑈14 68347⑈ 0971 00 ⑈000160000⑈



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

972

JUL 10 19 July 10 80 60-131/313

PAY TO THE ORDER OF Carl [illegible] $1,000 XX

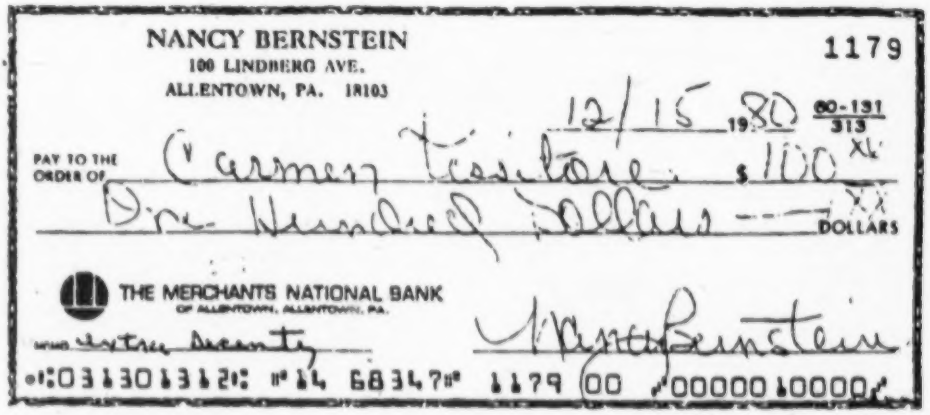
One thousand Dollars DOLLARS

THE MERCHANTS NATIONAL BANK

[illegible] Bernstein

⑆031301312⑆ ⑈14 68347⑈ 0972 00 ⑈0000100000⑈

103



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1179

12/15 1980 60-131/313

PAY TO THE ORDER OF Carmen Testore $ 100 XX

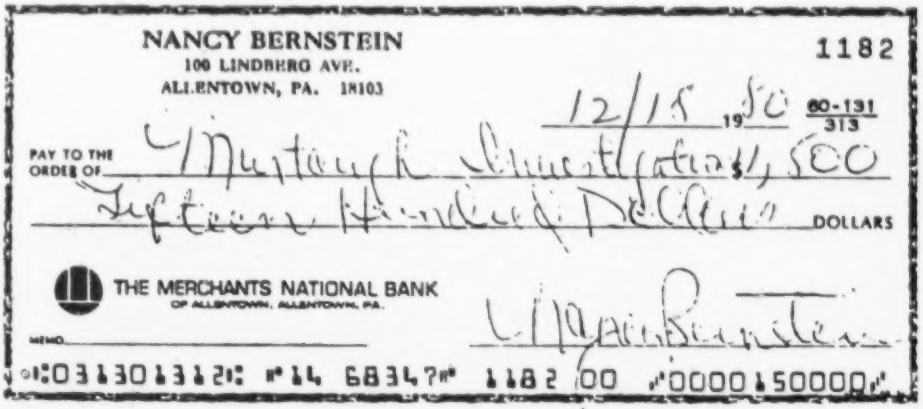
One Hundred Dollars --- DOLLARS

THE MERCHANTS NATIONAL BANK
OF ALLENTOWN, ALLENTOWN, PA.

MEMO Testore Deposit [illegible] Bernstein

⑆031301312⑆ ⑈14 68347⑈ 1179 00 ⑈0000010000⑈

104



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1182

12/15 1980 60-131/313

PAY TO THE ORDER OF Mantech Investigations $1,500

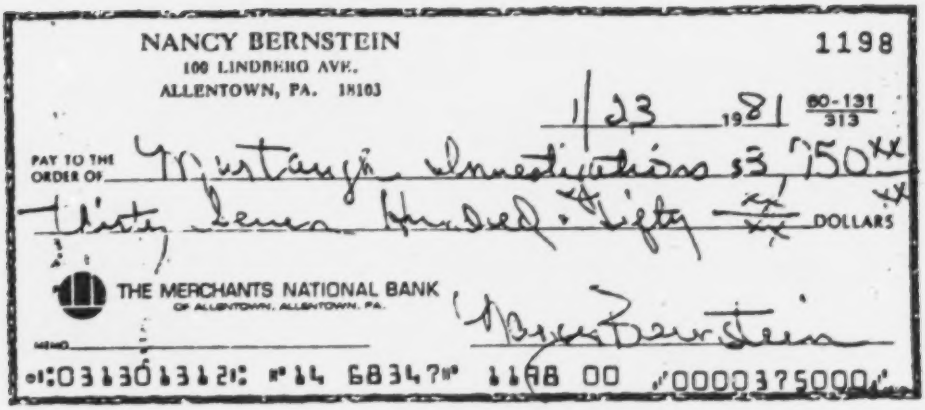
Fifteen Hundred Dollars DOLLARS

THE MERCHANTS NATIONAL BANK
OF ALLENTOWN, ALLENTOWN, PA.

MEMO [illegible] Bernstein

⑆031301312⑆ ⑈14 68347⑈ 1182 00 ⑈0001150000⑈

105



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1198

1/23 1981 60-131/313

PAY TO THE ORDER OF Mustang Investigations $3,750 XX

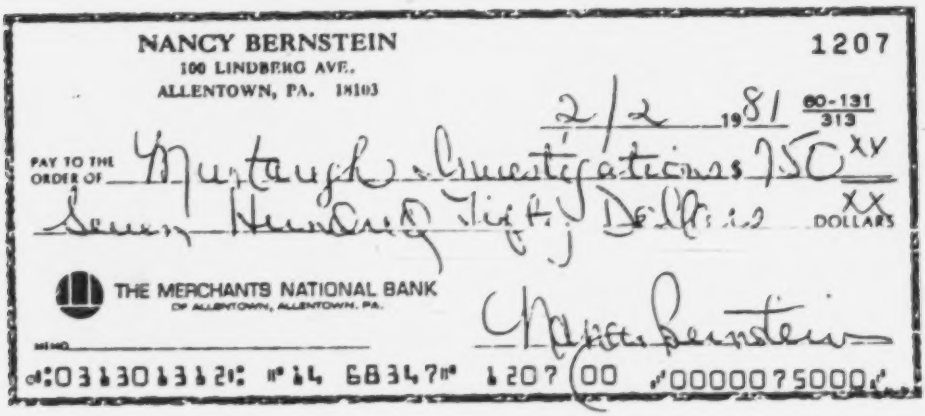
Three Seven Hundred Fifty XX/XX DOLLARS

THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆031301312⑆ ⑈14 68347⑈ 1198 00 ⑈000037500⑈



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1207

2/2 1981 60-131/313

PAY TO THE ORDER OF Mustang Investigations $750 XX

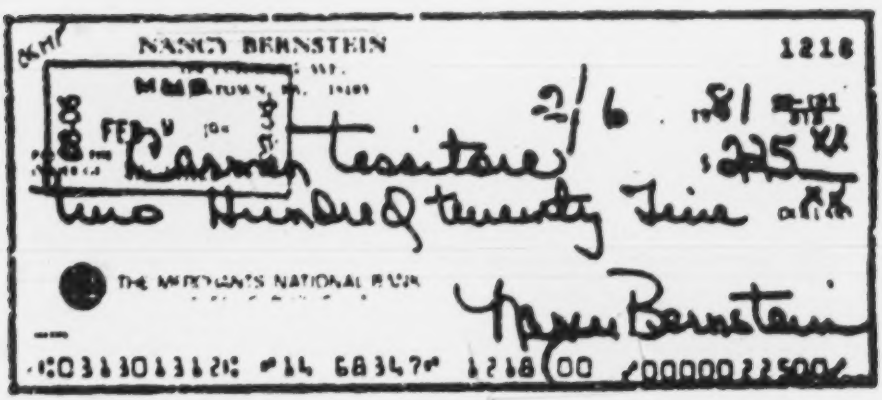
Seven Hundred Fifty Dollars XX DOLLARS

THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆031301312⑆ ⑈14 68347⑈ 1207 00 ⑈000007500⑈



NANCY BERNSTEIN

1218

2/6 1981 60-131/313

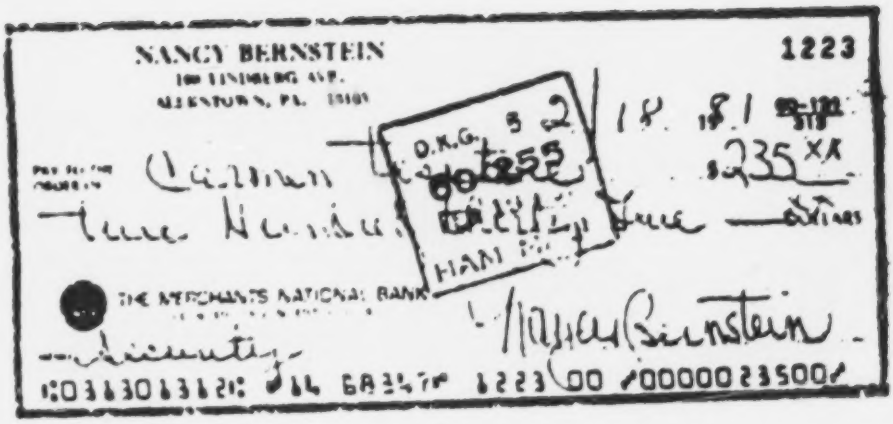
Pay to the order of Carmen Tessitore $225 XX

two Hundred twenty five XX/XX DOLLARS

THE MERCHANTS NATIONAL BANK

Nancy Bernstein

⑆031301312⑆ ⑈14 68347⑈ 1218 00 ⑈000022500⑈


NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1223

PAY TO THE ORDER OF Carmen

$235 XX

Two Hundred Thirty Five DOLLARS

THE MERCHANTS NATIONAL BANK

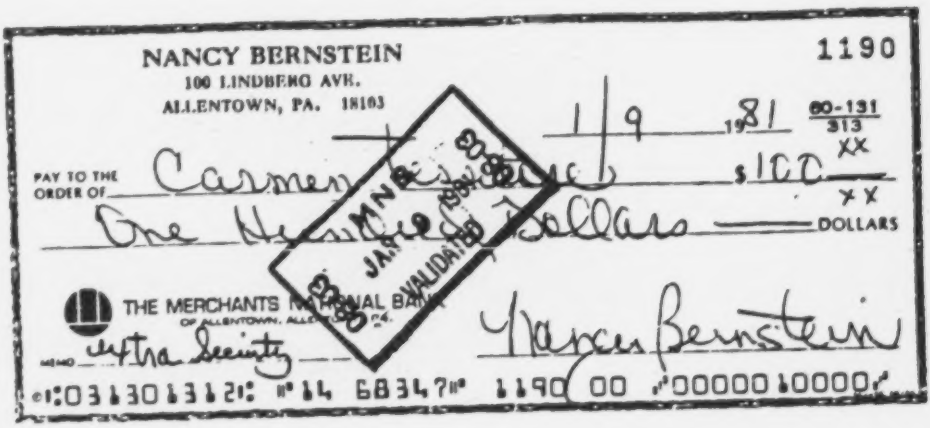
Security

Nancy Bernstein

D.N.G. 5 2

1:03130131 21: 11 68347 1223 00 00000 23500

109


NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1190

1/9 19 81 60-131 313

PAY TO THE ORDER OF Carmen

$100 XX

One Hundred Dollars DOLLARS

THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

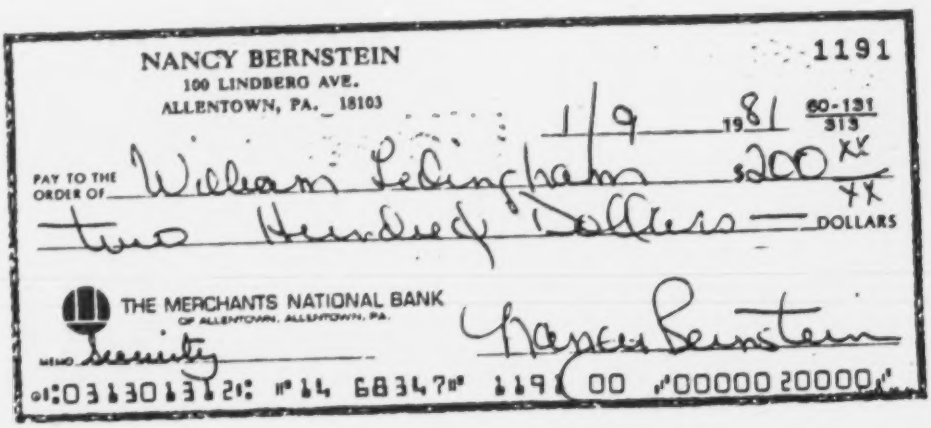
MEMO Extra Security

Nancy Bernstein

MNB JAN 9 1981 VALIDATED

1:03130131 21: 11 68347 1190 00 00000 10000

110


NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1191

1/9 19 81 60-131 313

PAY TO THE ORDER OF William Pedingham

$200 XX

two Hundred Dollars DOLLARS

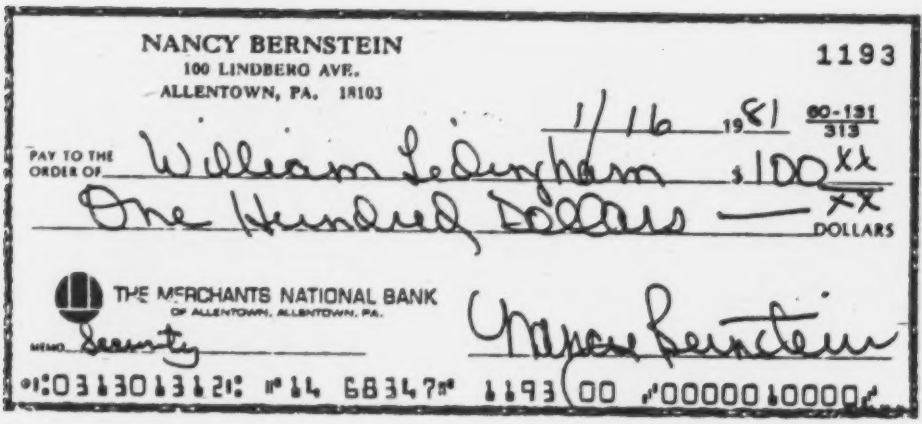
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO Security

Nancy Bernstein

1:03130131 21: 11 68347 1191 00 00000 20000

111



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1193

1/16 19 81 60-131/313

PAY TO THE ORDER OF William Ledingham $100 XX

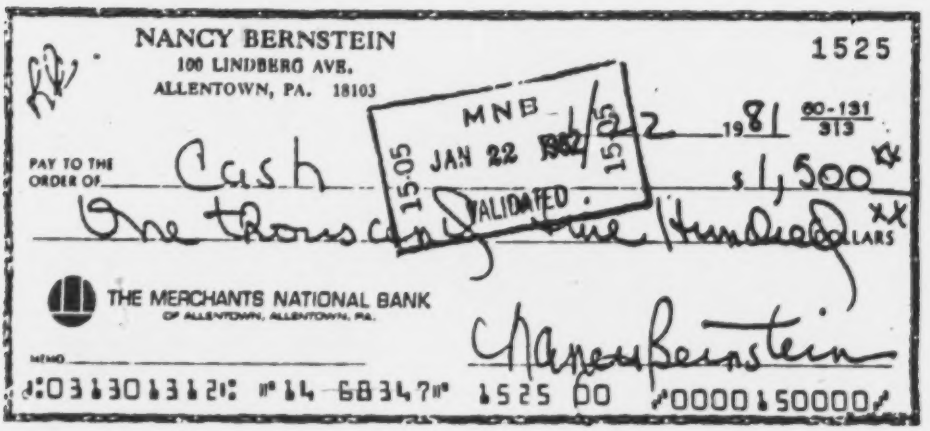
One Hundred Dollars — XX DOLLARS

THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO Security

Nancy Bernstein

⑆031301316⑆ 11 64 68347 1193 00 ⑈00000 10000⑈



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1525

MNB JAN 22 1982 15-2

1505 VALIDATED 15

1/22 19 81 60-131/313

PAY TO THE ORDER OF Cash $1,500 XX

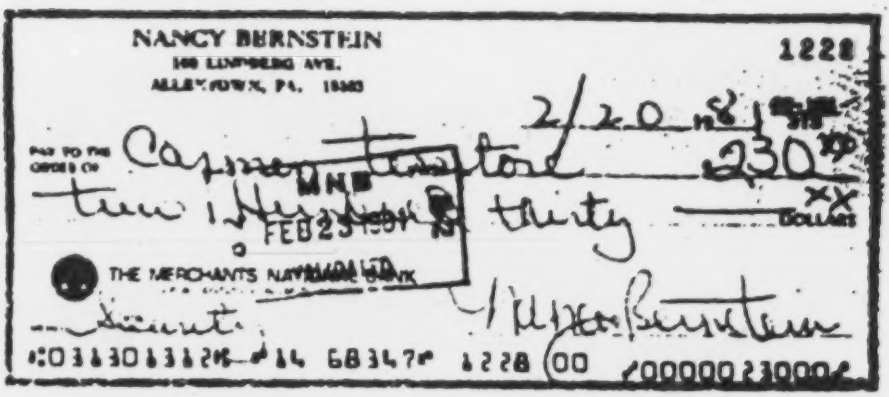
One thousand five hundred XX DOLLARS

THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆031301316⑆ 11 64 68347 1525 00 ⑈00001 50000⑈



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1228

2/20 19 81

PAY TO THE ORDER OF Cash 230 XX

two hundred thirty XX DOLLARS

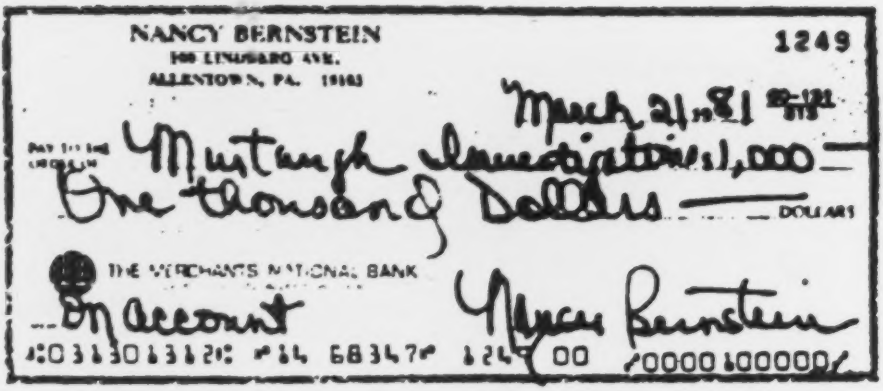
MNB FEB 25 1981

THE MERCHANTS NATIONAL BANK

Security

Nancy Bernstein

⑆031301316⑆ 11 64 68347 1228 00 ⑈00000 23000⑈


NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1249

March 21, 81

PAY TO THE ORDER OF Mustangh Investigations $1,000

One thousand & Dollars DOLLARS

THE MERCHANTS NATIONAL BANK

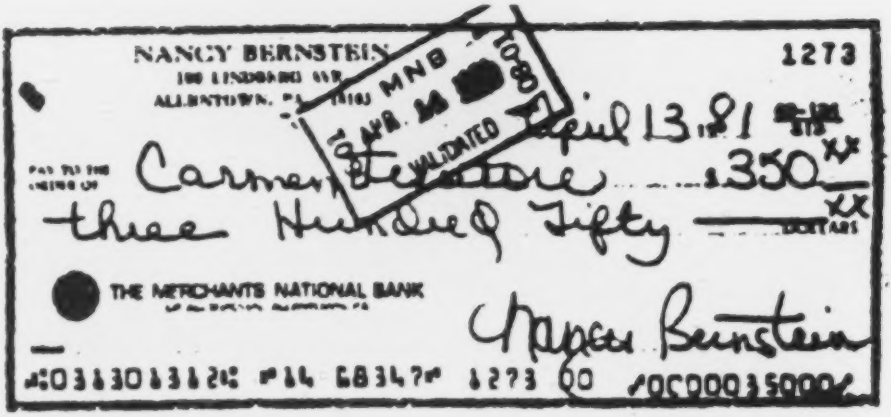
On account

Nancy Bernstein

⑆031830831⑇ #64 68347# 1249 00 /0000100000/

112

115


NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1273

MNB 1080 VALIDATED

April 13, 81

PAY TO THE ORDER OF Carmen Leporte $350 XX

three Hundred & Fifty XX DOLLARS

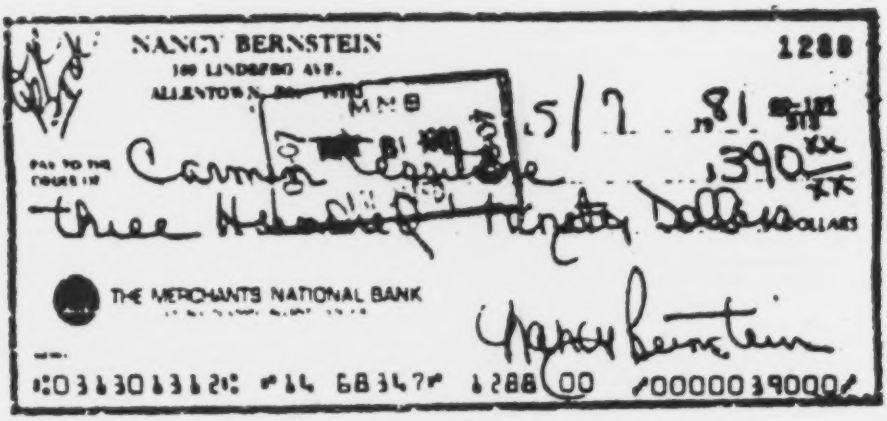
THE MERCHANTS NATIONAL BANK

Nancy Bernstein

⑆031830831⑇ #64 68347# 1273 00 /0000035000/

113

116


NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1288

MNB

5/7 81

PAY TO THE ORDER OF Carmen Leporte $390 XX

three Hundred Ninety Dollars DOLLARS

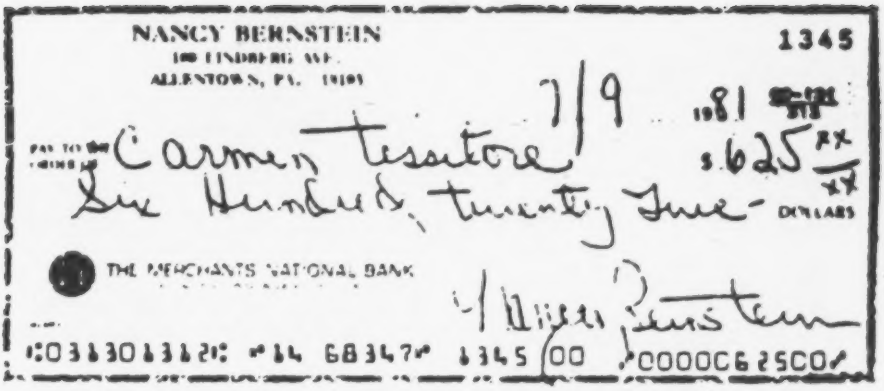
THE MERCHANTS NATIONAL BANK

Nancy Bernstein

⑆031830831⑇ #64 68347# 1288 00 /0000039000/

14

117


NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1345

7/9 1981

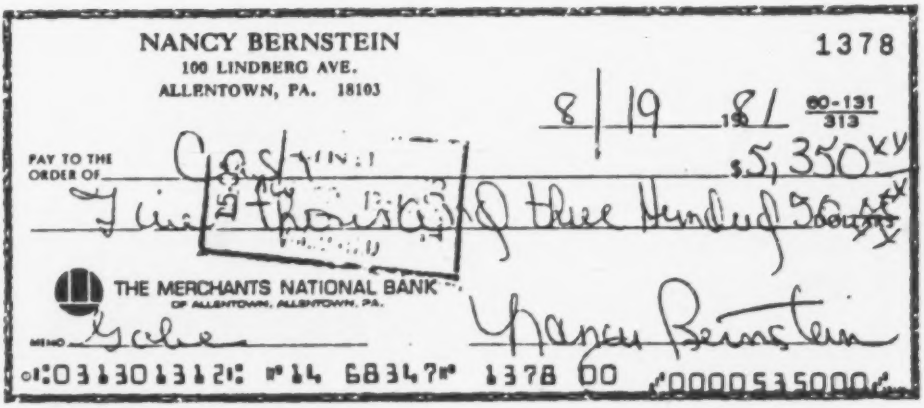
PAY TO THE ORDER OF Carmen Tesatore $625

Six Hundred, twenty five DOLLARS

THE MERCHANTS NATIONAL BANK

/s/ Nancy Bernstein

⑈03130131⑈ ⑈44 68347⑈ 1345 00 ⑈0000062500⑈


NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1378

8/19 1981 60-131/313

PAY TO THE ORDER OF Gastineau $5,350

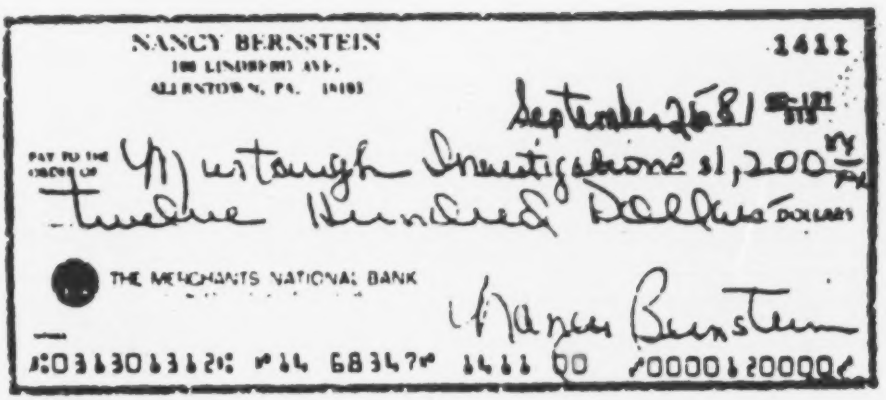
Five Thousand three Hundred 50 DOLLARS

THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO Labor

Nancy Bernstein

⑈03130131⑈ ⑈44 68347⑈ 1378 00 ⑈0000535000⑈


NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1411

September 26 1981

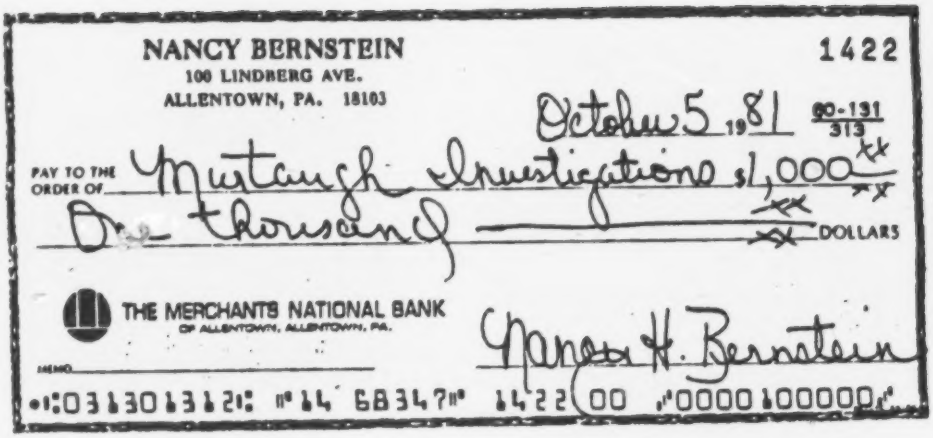
PAY TO THE ORDER OF Mountaintop Investigations $1,200

Twelve Hundred DOLLARS

THE MERCHANTS NATIONAL BANK

/s/ Nancy Bernstein

⑈03130131⑈ ⑈44 68347⑈ 1411 00 ⑈0000120000⑈



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1422

October 5 19 81 60-131 313

PAY TO THE ORDER OF Mutaugh Investigations $1,000 xx

One thousand xx DOLLARS

THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

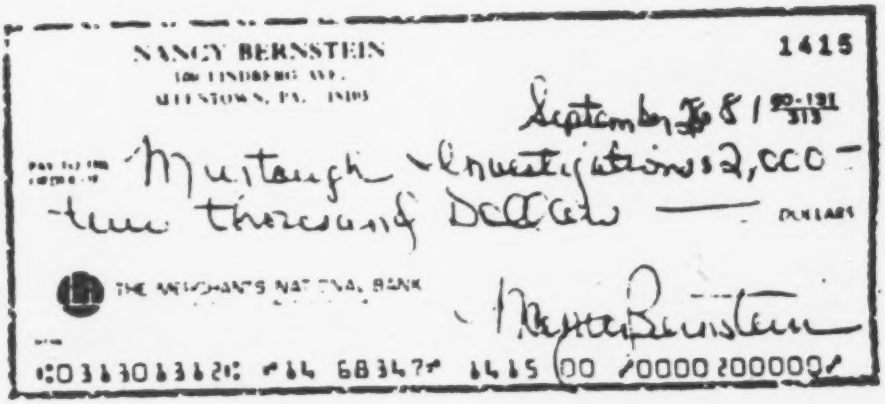
MEMO

Nancy H. Bernstein

⑆031301316⑆ ⑈64 68347⑈ 1422 00 ⑈0000100000⑈

18

121



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1415

September 5 81 60-131 313

PAY TO THE ORDER OF Mutaugh Investigations $2,000 -

two thousand Dollars DOLLARS

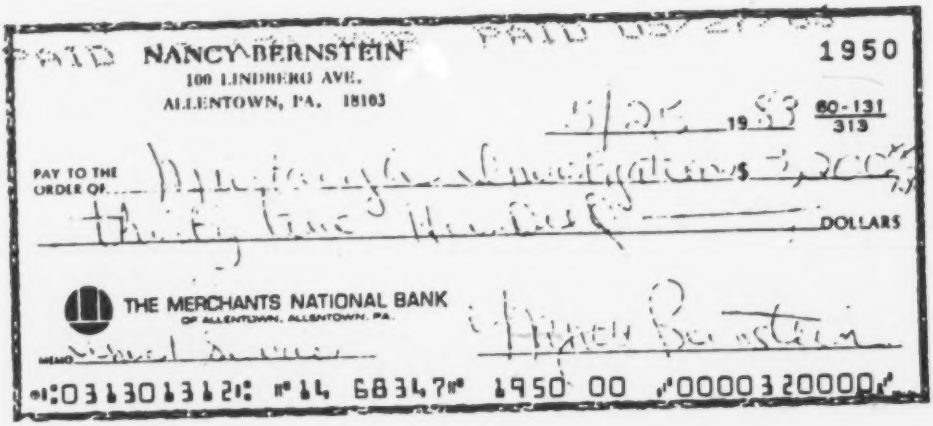
THE MERCHANTS NATIONAL BANK

Nancy Bernstein

⑆031301316⑆ ⑈64 68347⑈ 1415 00 ⑈0000200000⑈

119

122



PAID

NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1950

5/25 19 83 60-131 313

PAY TO THE ORDER OF Mutaugh Investigations $ 3,000 xx

Thirty two Hundred DOLLARS

THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

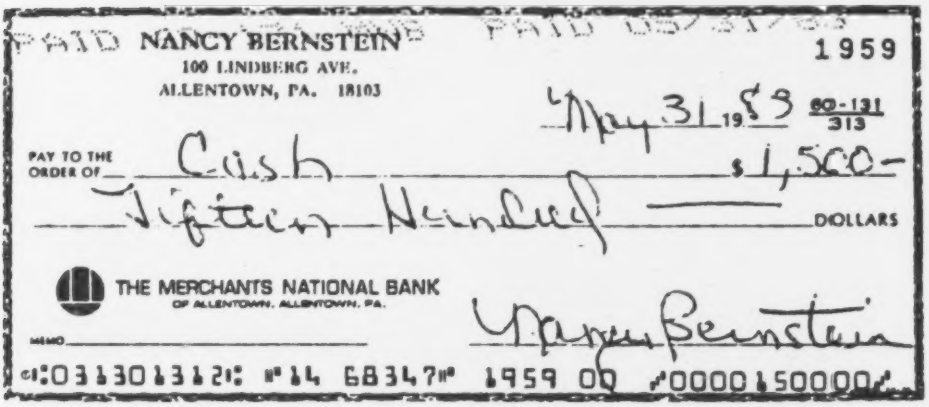
MEMO Final Payment

Nancy Bernstein

⑆031301316⑆ ⑈64 68347⑈ 1950 00 ⑈0000320000⑈

120

123



PAID NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1959

May 31 1983 60-131/313

PAY TO THE ORDER OF Cash $1,500-

Fifteen Hundred DOLLARS

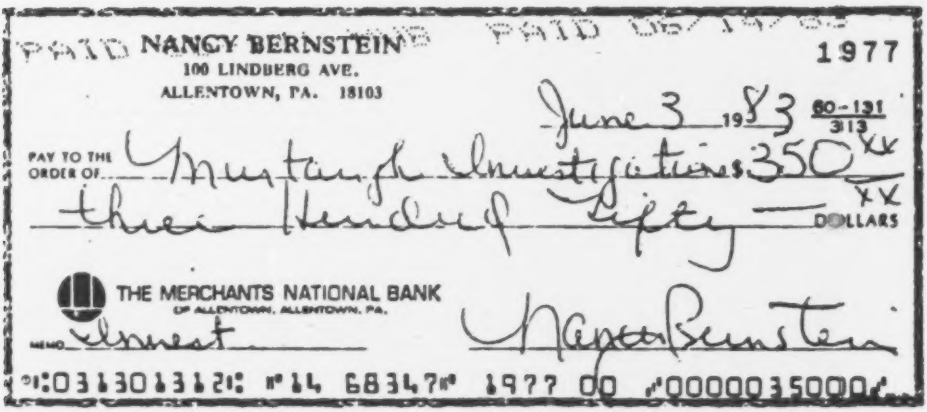
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆031301312⑆ ⑈14 68347⑈ 1959 00 ⑈0000150000⑈

124



PAID NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1977

June 3 1983 60-131/313

PAY TO THE ORDER OF Mustagh Investigations $350 XX

three Hundred Fifty XX DOLLARS

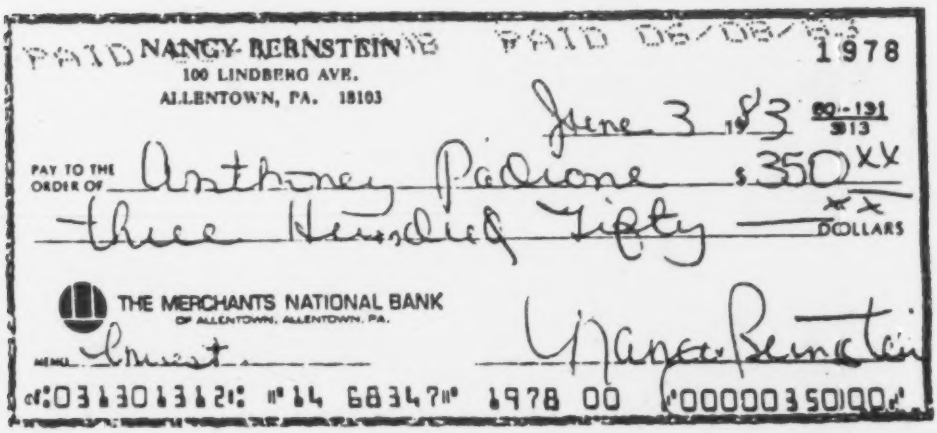
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO Invest

Nancy Bernstein

⑆031301312⑆ ⑈14 68347⑈ 1977 00 ⑈0000350000⑈

125



PAID NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1978

June 3 1983 60-131/313

PAY TO THE ORDER OF Anthoney Padrone $350 XX

three Hundred Fifty XX DOLLARS

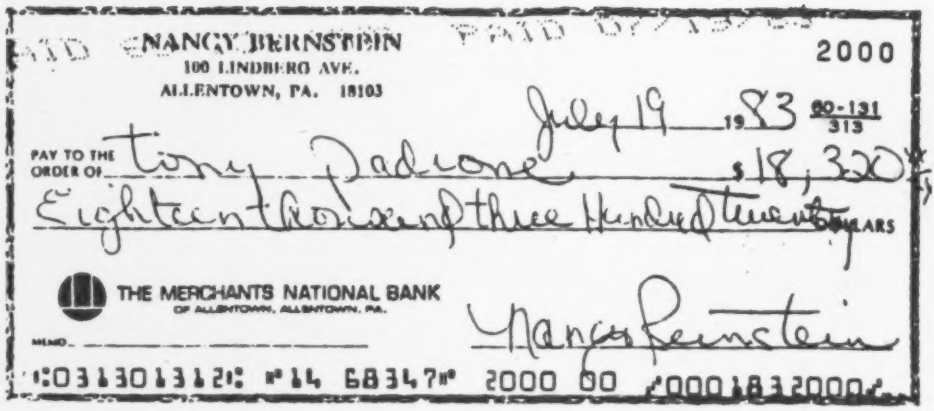
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO Invest

Nancy Bernstein

⑆031301312⑆ ⑈14 68347⑈ 1978 00 ⑈0000350100⑈

126



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

2000

July 19 1983 60-131/313

PAY TO THE ORDER OF Tony Padrone $18,320

Eighteen Thousand Three Hundred Twenty DOLLARS

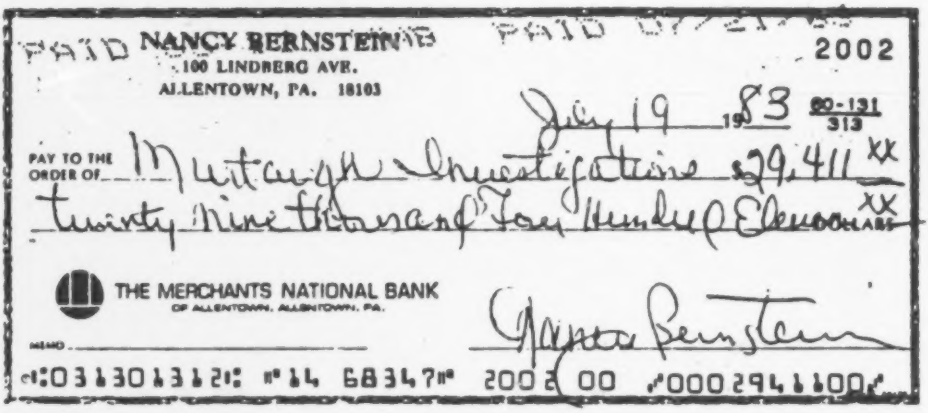
THE MERCHANTS NATIONAL BANK
OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆031301312⑆ ⑈14 68347⑈ 2000 00 ⑈000183200⑈

127



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

2002

July 19 1983 60-131/313

PAY TO THE ORDER OF Mutaugh Investigations $29,411 XX

twenty Nine Thousand Four Hundred Eleven XX DOLLARS

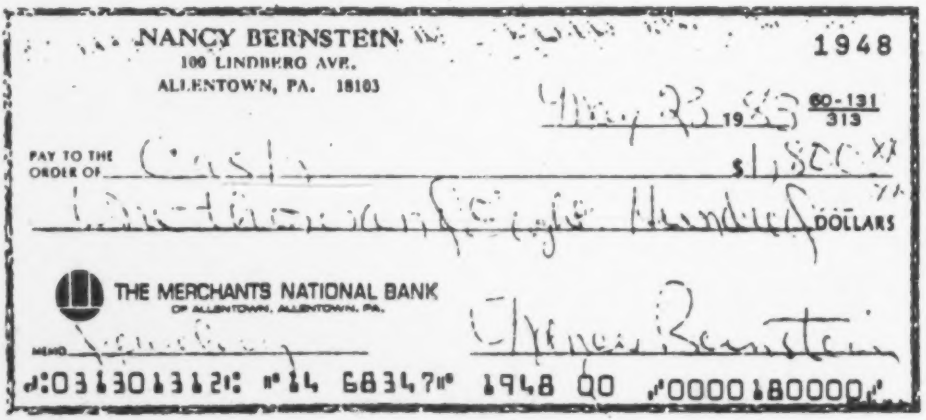
THE MERCHANTS NATIONAL BANK
OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆031301312⑆ ⑈14 68347⑈ 2002 00 ⑈000294100⑈

128



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1948

May 23 1983 60-131/313

PAY TO THE ORDER OF Cash $1,800 XX

One Thousand Eight Hundred DOLLARS

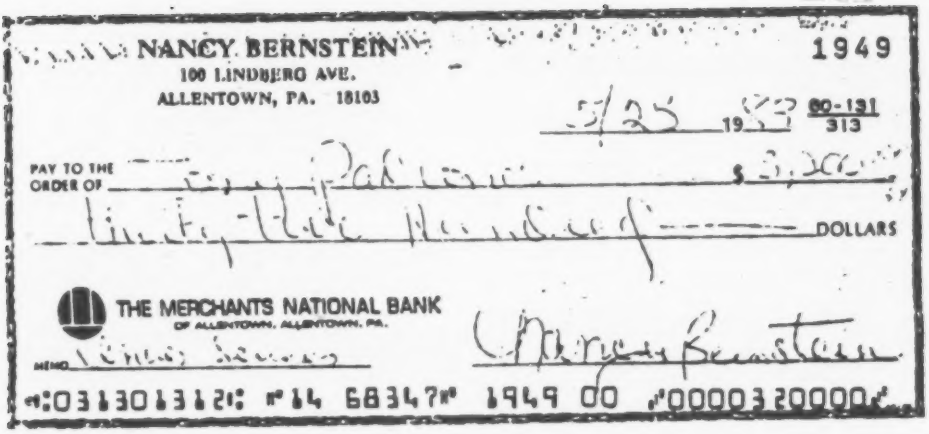
THE MERCHANTS NATIONAL BANK
OF ALLENTOWN, ALLENTOWN, PA.

MEMO Jewelry

Nancy Bernstein

⑆031301312⑆ ⑈14 68347⑈ 1948 00 ⑈000180000⑈

129



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

1949

5/25 19 83 80-131/313

PAY TO THE ORDER OF Pat Lane $ 3,200.00

Thirty-two Hundred ——— DOLLARS

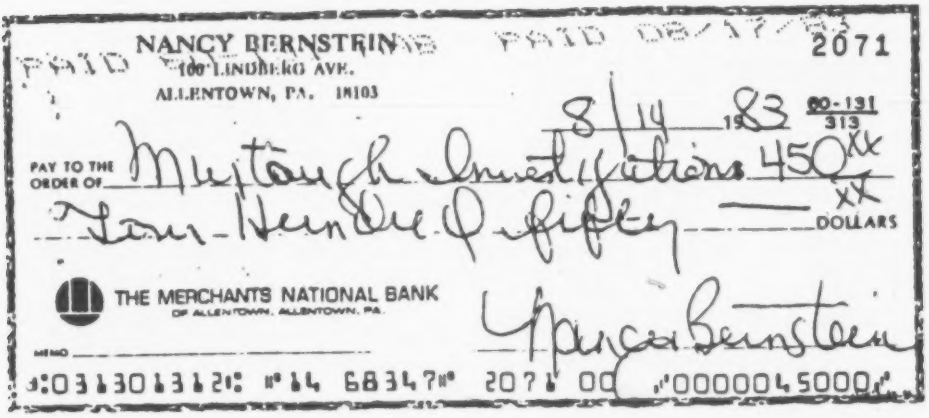
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO Legal Services

Nancy Bernstein

⑆031301312⑆ ⑈14 68347⑈ 1949 00 ⑈00003 20000⑈

130



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

2071

8/14 19 83 80-131/313

PAY TO THE ORDER OF Mytouch Investigations 450 XX XX

Four Hundred fifty ——— DOLLARS

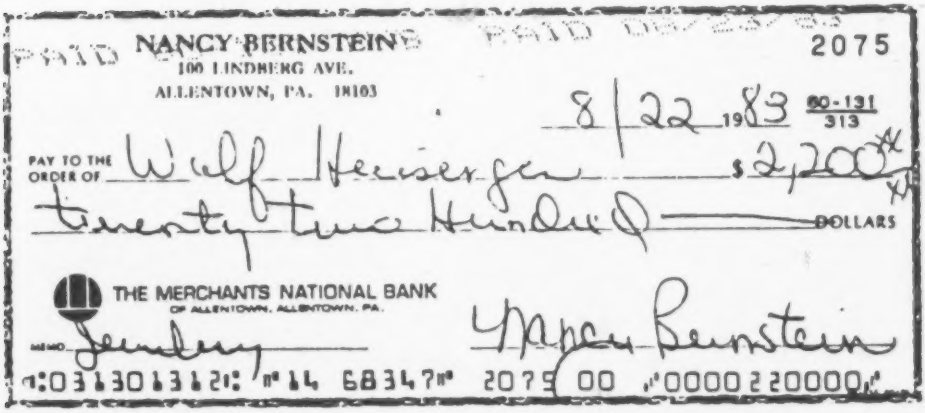
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆031301312⑆ ⑈14 68347⑈ 2071 00 ⑈00004 5000⑈

131



NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

2075

8/22 19 83 80-131/313

PAY TO THE ORDER OF Wolf Heusergen $ 2,200 XX XX

twenty two Hundred ——— DOLLARS

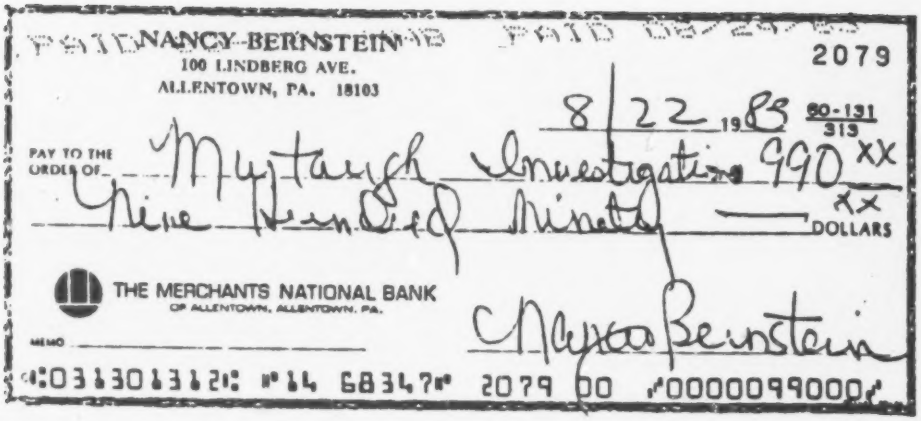
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO Tendency

Nancy Bernstein

⑆031301312⑆ ⑈14 68347⑈ 2075 00 ⑈00002 20000⑈

132


NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

2079

8/22 19 83 60-131/313

PAY TO THE ORDER OF Mytaugh Investigations 990 XX

Nine Hundred Ninety XX DOLLARS

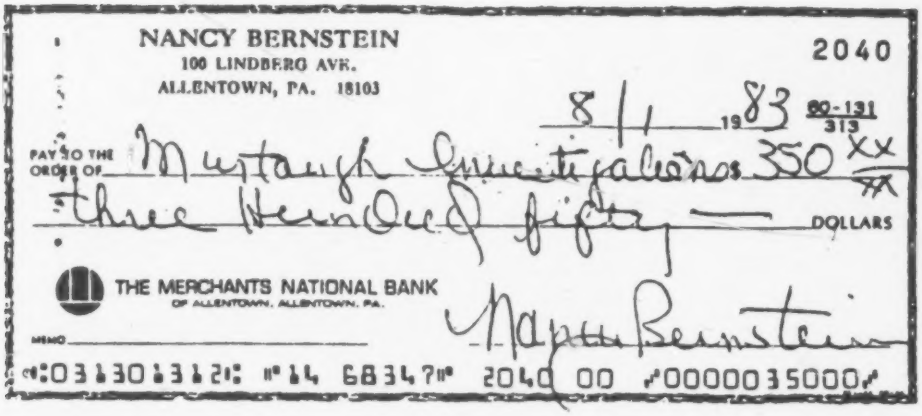
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆:03130131 21⑆ ⑈14 68347⑈ 2079 00 ⑈0000099000⑈

133


NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

2040

8/1 19 83 60-131/313

PAY TO THE ORDER OF Mytaugh Investigations 350 XX

three Hundred fifty XX DOLLARS

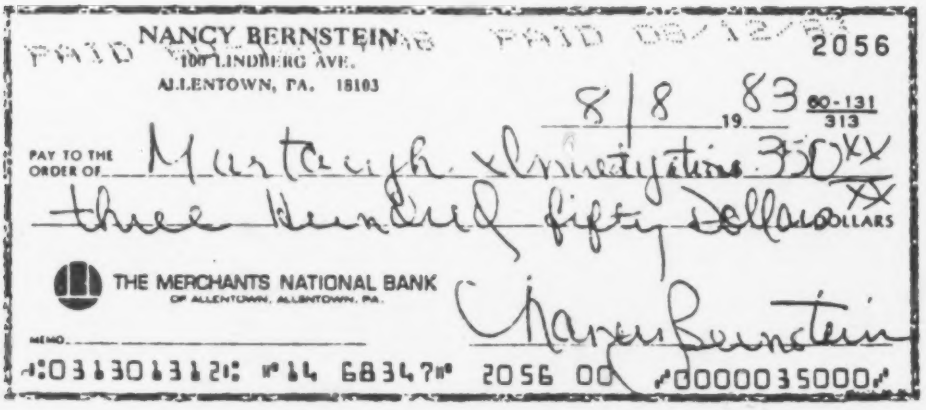
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO

Nancy Bernstein

⑆:03130131 21⑆ ⑈14 68347⑈ 2040 00 ⑈0000035000⑈

134


NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103

2056

8/8 19 83 60-131/313

PAY TO THE ORDER OF Mytaugh Investigations 350 XX

three Hundred fifty Dollars XX DOLLARS

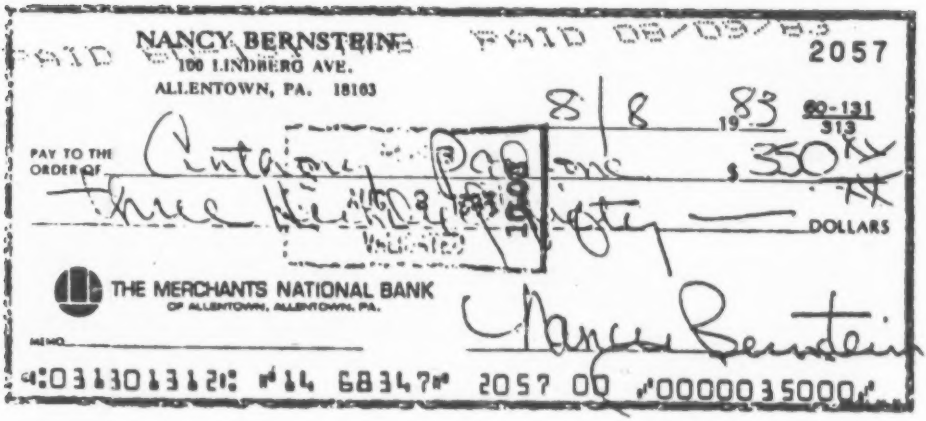
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.

MEMO

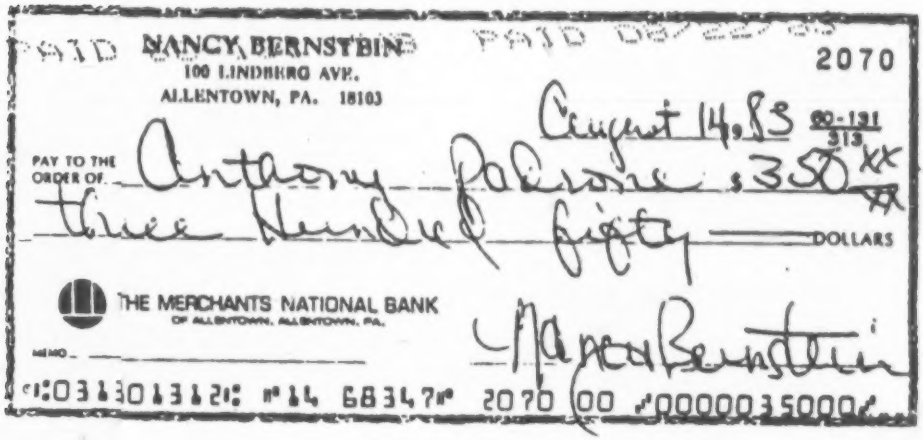
Nancy Bernstein

⑆:03130131 21⑆ ⑈14 68347⑈ 2056 00 ⑈0000035000⑈

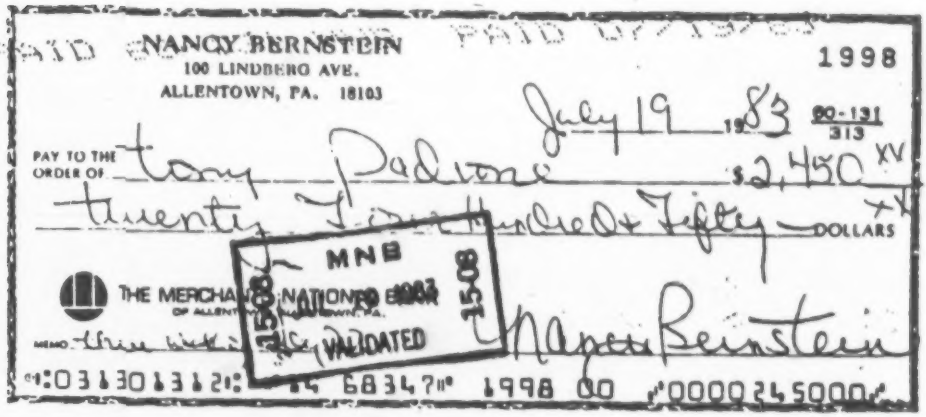
135


NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103
2057
8/8 19 83 20-131/313
PAY TO THE ORDER OF Antony Padrone $ 350 XX
three Hundred fifty DOLLARS
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.
MEMO
Nancy Bernstein
⑆03130131⑆ 11 68347 2057 00 00000350 00

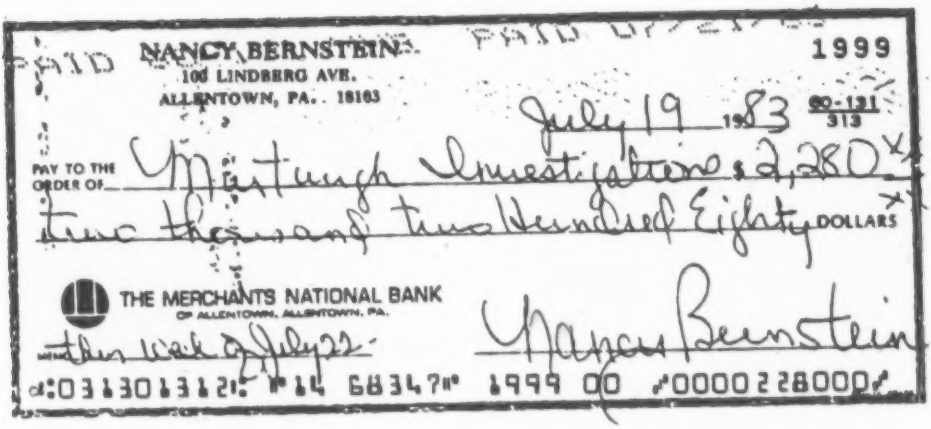
136


NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103
2070
August 14, 83 20-131/313
PAY TO THE ORDER OF Antony Padrone $ 350 XX
three Hundred fifty DOLLARS
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.
MEMO
Nancy Bernstein
⑆03130131⑆ 11 68347 2070 00 00000350 00

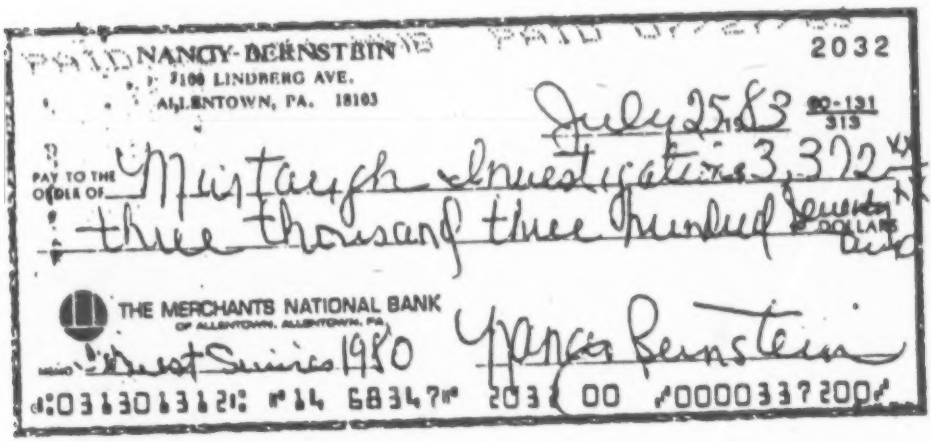
137


NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103
1998
July 19 19 83 20-131/313
PAY TO THE ORDER OF Tony Padrone $ 2,450 XX
twenty Four Hundred & Fifty DOLLARS
MNB 1508 VALIDATED 1508
THE MERCHANTS NATIONAL BANK
MEMO Three Weeks
Nancy Bernstein
⑆03130131⑆ 11 68347 1998 00 00002450 00

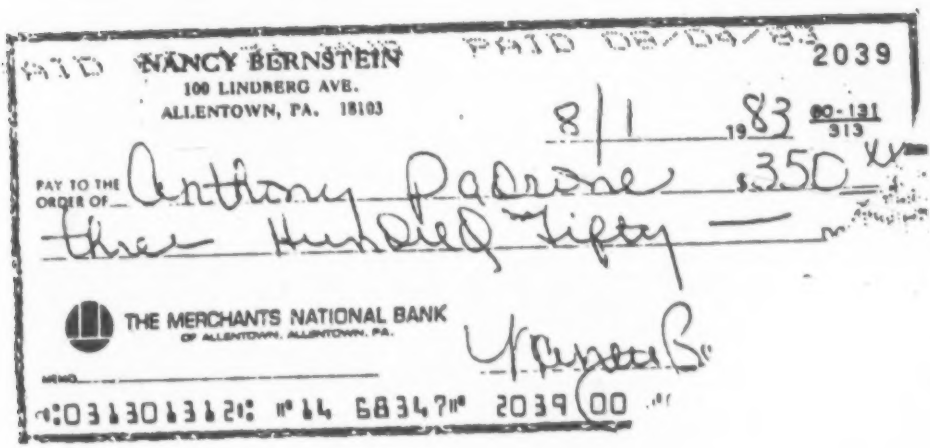
138


PAID
NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103
1999
July 19 1983
80-131/313
PAY TO THE ORDER OF Mintaugh Investigations $2,280.XX
two thousand two Hundred Eighty DOLLARS
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.
for the week of July 22
Nancy Bernstein
⑆031301312⑆ ⑈14 68347⑈ 1999 00 ⑈0000228000⑈

139


PAID
NANCY BERNSTEIN
100 LINDBERG AVE.
ALLENTOWN, PA. 18103
2032
July 25 83
80-131/313
PAY TO THE ORDER OF Mintaugh Investigations $3,372.XX
three thousand three hundred seventy two DOLLARS
THE MERCHANTS NATIONAL BANK OF ALLENTOWN, ALLENTOWN, PA.
MEMO Guest Services 1980
Nancy Bernstein
⑆031301312⑆ ⑈14 68347⑈ 2032 00 ⑈0000337200⑈

140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No. 85-1691

Supreme Court, U.S.
FILED
JUN 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1985

SANFORD BERNSTEIN,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA, JAMES MC CARTHY, COUNTY OF LEHIGH, WILLIAM PLATT, ANTHONY PADRONE, WULF HEUSINGER, THOMAS MURTAUGH, DONALD LAYTON, DALE YEAGER, MICHAEL ALVIN, JIMMY H. COLEMAN, NANCY H. BERNSTEIN, CATASAUQUA POLICE DEPARTMENT, ALLENTOWN POLICE DEPARTMENT, WOODROW KEISER,

Respondents.

ALLENTOWN POLICE DEPARTMENT'S RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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ALLENTOWN POLICE DEPARTMENT'S RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Response

The Allentown Police Department takes no position as to the Petition for a Writ of Certiorari. The District Court, in its Order dated September 27, 1983 (Appendix at A-4) stated:

> 5. The Motion of the Allentown Police Department to dismiss all claims against it is GRANTED on the ground that this defendant is not an entity amenable to suit.

This ruling as to the Allentown Police Department was not challenged and is not related to the issues of this Appeal.

Conclusion

For the reasons set forth above, the Allentown Police Department is not a party in interest to this Petition for a Writ of Certiorari and takes no position as to whether a Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-1691

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Respondents.

Certificate of Service

AND NOW, this 25th day of June, 1986, I Patrick M. Maher hereby certify that I have, this day, served a true and correct copy of Response to Petition for a Writ of Certiorari in the above-captioned action, by depositing a

copy of same in the United States mail, first-class, postage prepaid in Batavia, New York, addressed as follows:

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Reply of Nancy H. Bernstein to Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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I. COUNTER-STATEMENT OF THE CASE

Respondent accepts the Statement of the Case recited in the Petitioner's brief. However, for purposes of clarification, Respondent adds the following pertinent information.

The crux of Mr. Bernstein's complaint revolves around the recantation by Commonwealth witness Coleman. Mr. Coleman had recanted his trial testimony on March 17, 1980, giving other statements apparently implicating Murtaugh, Padrone and a Wulf Heusinger of intimidating him into testifying against Mr. Bernstein at trial and threatening him not to change his story afterwards.

The first hearing on remand from the Superior Court to test Mr. Coleman's credibility took place on April 4, 1983. Counsel for Mr. Bernstein requested that the Court grant Mr. Coleman immunity. The Court refused. Mr. Coleman thereafter pleaded the Fifth Amendment in response to questions by Mr. Bernstein's counsel.

The April 4th hearing was eventually continued because certain matters had been filed in the Superior and Supreme Courts and a question arose as to whether or not the Common Pleas Court had jurisdiction.

On May 5, 1983 Mr. Coleman gave a statement in the District Attorney's office of Lehigh County, following an offer by the District Attorney of immunity from prosecution as a result of anything growing out of the statement given on March 17, 1980 or any statement Mr. Coleman

would give to the District Attorney on May 5, 1983. In other words the District Attorney would not charge Mr. Coleman with perjury at that point. Mr. Coleman then proceeded to testify that the testimony he gave at Mr. Bernstein's original trial was truthful and that the recantation statements made in September and October of 1980 were not truthful. Mr. Coleman's testimony to that effect was repeated at the resumption of the hearing on the credibility of Mr. Coleman's recantation in the Dauphin County Court of Common Pleas on July 1, 1983. Following that hearing and a final hearing on September 9, 1983, the motions for a new trial based on Mr. Coleman's recantation were dismissed and the sentence reinstated.

II. SUMMARY OF ARGUMENT

At least with respect to the within action, it is not necessary to draw a distinction between characterizing Petitioner's actions under 42 U.S.C. §1983 and his claims under 42 U.S.C. §§1981, 1982, 1985 and 1986. Such characterization is controlled by the nature of the allegations in the Complaint. In the instant action all of the Petitioner's civil rights actions are based on the exact same allegations and requests for remedy. Therefore they should all be treated the same for purposes of statute of limitations whether or not they fall within the ambit of *Wilson v. Garcia,* U.S. , 105 S.Ct. 1938 (1985).

In the alternative, should this Court consider it necessary to determine the appropriate characterization of actions under 42 U.S.C. §§1981 and 1985, it is respectfully submitted that the reasoning of *Wilson v. Garcia,* should apply.

With respect to Respondent's second claim, this Court has already resolved the issue of retroactivity in *Chevron Oil Company v. Huson,* 404 U.S. 97 (1971). The retroactive application of *Wilson v. Garcia,* supra, to the within case is appropriate under the existing standards of *Chevron Oil,* supra.

Petitioner's third argument requests this Court to establish a uniform standard for determining the date a statute of limitations begins to run in a civil conspiracy. It is respectfully submitted that the District Court applied the appropriate test; that the period runs from each overt act

causing damage. While some courts have applied the rule used in criminal cases (that is that limitations periods run from the commission of the last overt act of the conspiracy), Respondent respectfully submits that this is not the appropriate standard for a civil conspiracy.

Petitioner's last two arguments, requesting this Court to exercise its supervisory powers or in the alternative to remand the case for clarification, are merely rehashings of the position Petitioner takes elsewhere in his brief.

III. ARGUMENT

A. Wilson v. Garcia requires that all of the Petitioner's civil rights actions be governed by the same Statute of Limitations.

Count I of Petitioner's Complaint alleges at Paragraph 42 violations of 42 U.S.C. §§1981, 1982, 1985 and 1986 (Appendix at A-87). All of the alleged violations are based on the facts pleaded to that point. There is no distinction drawn by Petitioner between activities which allegedly led to his §1983 cause of action vis-a-vis any of the other civil rights sections.

Although in *Wilson v. Garcia,* supra, this Court decided that the personal injury statute of limitations was applicable to §1983 actions, the Court's reasoning strongly suggests that the same holds true for other civil rights violations which are of a similar nature.

As noted in *Wilson,* supra, the controlling section of the civil rights statute with respect to which statute of limitations should apply is §1988. This section requires that the length of limitation period be governed by state law, and applies to all of the statutory sections in Petitioner's Complaint. Furthermore, as the Court noted:

> Even though §1983 actions encompass a wide variety of fact situations and legal theory, all of the Federal values at issue in selecting a limitations period for 1983 claims are best served by articulating one

uniform characterization describing the central nature underlying all such claims. (Citing the 10th Circuit Opinion in *Wilson v. Garcia,* 731 F.2d 643 at 6501), *Wilson v. Garcia,* 105 S.Ct. at 1941 (1985).

That the *Wilson* reasoning encompasses more than simply §1983 actions is further confirmed by the language of the Court's Opinion where it states:

> The imposition of the policies of the States on matters of civil rights is not the primary office of the borrowing provision in §1988; rather the statute is designed to insure that neutral rules of decision will be available to enforce *the civil rights actions, among them §1983. Wilson v. Garcia,* 105 S.Ct. at 1943. (Emphasis added.)

The choice of a personal injury statute of limitations was applied by the Court in §1983 actions because of the nature of remedies involved therein. In the case at bar, not only are all of Petitioner's civil rights actions based upon the same factual allegations, but they all request the precise same remedies. These factual allegations and the remedies requested, reflect what this Court observed as the unifying theme of the Civil Rights Act of 1871; protection against personal injury. *Wilson v. Garcia,* 105 S.Ct. at 1948.

The application of *Wilson v. Garcia,* supra, where similar factual allegations have been said to give rise to differing civil rights causes of action, was foreshadowed by the practice in the Third Circuit. (See Argument B, infra.)

Petitioner takes issue with the District Court's decision that all of Petitioner's claims should be pursued

through §1983. However, §1983 is certainly the broadest and most sweeping of the civil rights statutes. *Campbell v. Gadsden County District School Board,* 534 F.2d 650 (Cir. 5, 1974). Petitioner argued below that §§1981 and 1983 should be characterized differently because they seek separate remedies, an argument which is not advanced in his Brief to this Court. However, Petitioner's pleadings request precisely the same remedies under each of the civil rights violations alleged. Moreover, the §1986 action for neglecting to prevent violation of civil rights is dependent upon a violation having been committed under the others.

Petitioner has yet to relate specific factual allegations to each of the alleged civil rights statutes so as to reflect the uniqueness of each statute and its remedies. Judge Cahn was correct in characterizing §1983 as the most appropriate vehicle for the factual claims made by the Petitioner. However, even if that were not so, it is submitted that the statute of limitations would bar the other statutory actions as well.

B. There is no conflict as to the retroactive application of Wilson v. Garcia. This issue is controlled by this Court's prior holding in Chevron Oil Co. v. Huson.

The Petitioner suggests that a conflict exists because different results have been reached, even within the Third Circuit as to whether *Wilson v. Garcia,* supra, should be applied retroactively.

This Court has established both general guidelines and limited exceptions to the retroactive application of new principles of law. The general guideline is as follows:

Argument

> The presumption that the holding of the case will be applied retroactively as well as prospectively is merely a corollary of the principle that federal courts should apply the law in effect at the time that the cases are adjudicated. *Gulf Offshore Company v. Mobile Oil Corp.*, 453 U.S. 473, 486 n. 16 (1981).

The exceptions to retroactive application were determined by this Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). The factors set forth in *Chevron* are: 1. the likelihood that the litigant may have relied on "clear past precedent" or an inability to foresee the direction in which the appellate court was moving in an issue of first impression; 2. the prior history, purpose and effect of the new rule of law; and 3. to what extent a retroactive application would work an inequitable hardship on the litigant.

C. The standard for determining the date on which a civil conspiracy accrues, as properly applied by the District Court, is the date of each overt act causing damage.

Petitioner would have this Court believe that an improper standard was applied by the lower Courts in determining when his cause of action accrued. Such is not the case. It is admitted that the Memorandum Opinion of the Third Circuit did not address the issue of accrual in detail. However, that Court's indication that the "cause of action arose in March 1980 when he knew, or with reasonable diligence should have known, of the conspiracy." Bernstein, No. 85-1371 (3d. Cir. Jan. 15, 1986), (Appendix at A-2), must be read in conjunction with the more detailed statement of the District Court.

Argument

The District Court's discussion of the Petitioner's "due diligence" was not with respect to accrual of the cause of action but rather a response to Petitioner's claims that the statute was tolled by fraudulent concealment (Appendix at A-13, A-14).

While accrual and tolling may at times be opposite sides of the same coin, they are nevertheless treated distinctly. The question of accrual is governed by federal law, matters of tolling are governed by state law. *Wilson v. Garcia,* 105 S.Ct. at 1943.

Pennsylvania requires that a party asserting a claim has a duty to use all reasonable diligence to properly inform himself of facts and circumstances on which his right of recovery is based and to institute suit within the prescribed statutory period. *Schaffer, Appellant v. Larzelere,* 410 Pa. 402, 189 A.2d 267 (1963).

In determining the date of accrual of his cause of action, the District Court correctly noted that:

> Moreover, despite Plaintiff's conclusory allegations of continuing conspiracy, the record fails to establish any post-conviction conduct on the part of the Defendants for which Plaintiff may seek relief (Appendix at A-12).

This analysis is in line with the well stated rule that the period in a civil conspiracy runs from each overt act causing damage. *Ammulung v. City of Chester,* 498 F.2d 811, 814-15 (3d Cir. 1974). It is true that some courts have applied in civil cases, the rule used in criminal cases that the limitation period begins on the commission of the last overt act of the conspiracy. *White v. Bloom,* 621 F.2d 276 (8th Cir., *cert. den.* 449 U.S. 995 1980).

Argument

It is respectfully submitted, however, that there is reason for making the distinction between a criminal and civil conspiracy as pointed out by the Third Circuit in *Wells v. Rockefeller,* 728 F.2d 209 (3d Cir. 1984). There the court defended its application of the "each overt act causing damage" rule, noting:

> The rule generally adopted by the case law in this Circuit provides greater certainty as to when a particular cause of action arises. For each act causing injury, a claimant must seek redress within the prescribed limitations. Such a rule is consistent with the distinction between civil and criminal conspiracies. In the civil case, actual injury is the focal point, not the illegal agreement per se, as is true in the criminal context. *Wells,* 728 F.2d at 217.

In the within case, the Petitioner alleges that the payment of monies and manipulation of Coleman's testimony following the first recantation hearing give rise to new causes of action. While these acts may continue the ill effects of the original alleged violation, they do not constitute new causes of action. *Sandutch v. Muroski,* 684 F.2d 252 (3rd Cir. 1982); *Gaito v. Strauss,* 249 F. Supp. 923 (W.E.Pa. 1966), aff'd 368 F.2d 787 (3d Cir. 1966), *cert. den.,* 386 U.S. 977 (1967).

Petitioner's argument that the present case is unlike *Gaito* and *Sandutch* because there were independent acts committed within the two years prior to the filing of the complaint is belied by the facts. Take for instance the argument with respect to the receipt of funds. Petitioner argues that certain "co-conspirators accepted payments from Nancy Bernstein in exchange for compromising their posi-

tions of authority as part of the conspiracy from about December 1978 to the present." Certainly payment for a prior act of conspiracy does not in and of itself constitute a new act, no matter how long it takes to pay off the alleged original act.

Additionally, the record establishes that at the evidentiary hearing on recantation held April 4, 1983, Mr. Bernstein's attorney requested the Court to issue Mr. Coleman immunity; something which only the District Attorney's office has the authority to do. When the Court denied the request, Mr. Coleman, in response to questioning by Mr. Bernstein's counsel, took the Fifth Amendment and refused to answer (Third Circuit App. at 43-89). Throughout that hearing he refused to answer any questions concerning the nature of his alleged recantation. Therefore, as of that point, without any allegations of either continuing or new conduct on the part of any of the Defendants, save Mr. Coleman, Mr. Bernstein was in no better position than he had been on the date of his conviction. Mr. Coleman's refusal to testify left his trial testimony intact.

At the meeting on May 5, 1983 the District Attorney offered Mr. Coleman immunity if he would tell the truth. Accepting said immunity, Mr. Coleman then testified that his recantation was untrue and that his trial testimony was true. Whatever the characterization of the District Attorney's actions may be in this respect, the result was certainly to cause no more harm to Mr. Bernstein. Whether Mr. Coleman chose to plead the Fifth Amendment as he did in the April hearing prior to any alleged misconduct of the District Attorney, or whether under immunity he denied his recantation, the result with respect to Mr. Bernstein's

civil rights was exactly the same. No new damages were created.

D. The Third Circuit did not depart so far from the acceptable and usual judicial standards as to warrant the exercise of this Court's power of supervision.

This is the section where Petitioner "bangs on the table." Displeased with the outcome of his case in the District Court and the Third Circuit, having neither strong legal nor factual arguments to rely on, he adds the lower Courts to the number of conspirators against him.

It is respectfully submitted that the popularity, or lack thereof, of the Petitioner had nothing to do with his criminal conviction, and certainly nothing to do with the decisions of the District Court and Third Circuit Court below.

E. There is no need to remand this case for further proceedings.

Petitioner suggests that if this Court denies a grant of certiorari, it should remand the case for further proceedings or clarification of the record. The specific issue which Petitioner raises that is claimed to need clarification appears to be whether it was proper for the District Court to dismiss those civil rights actions other than Section 1983. Admittedly, the District Court may not have anticipated that the case would turn on a statute of limitations questions at the time it dismissed the Petitioner's other civil rights action.

Argument

However, for the reasons set forth in Argument A, supra, it is respectfully submitted that, given the character of the Petitioner's factual allegations, the two year Pennsylvania statute of limitations for personal injury actions applies to all of his civil rights claims. Therefore, there is no need to reopen the case to discover why the District Court allowed the case to proceed on only the Section 1983 claim.

IV. CONCLUSION

For the reasons set forth above, Respondent Nancy H. Bernstein respectfully requests that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit be denied. In the alternative, should this Court find it necessary to determine the substantive issues involved, it is respectfully submitted that for the reasons set forth above, the Order of the Third Circuit Court of Appeals should be affirmed as a summary disposition of this matter.

Respectfully submitted,

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Respondents.

LEHIGH COUNTY'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Respondents.

LEHIGH COUNTY'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

I. STATEMENT OF CASE

A. FACTUAL BACKGROUND. In early 1980 Petitioner was found guilty by a jury of criminal solicitation to murder his then estranged wife, and sentenced to a term of imprisonment of from five (5) to ten (10) years and a fine of $25,000. On January 28, 1983, the Supreme Court of Pennsylvania, reviewing Petitioner's judgment of sentence, remanded the case to the Court of Common Pleas of Dauphin County for a determination of whether Petitioner was entitled to a new trial. The remand was, in part, due to an alleged recantation by a witness, Jimmy H. Coleman on March 17, 1980, of his trial testimony against the Petitioner so that the trial court could hold an evidentiary hearing as to Jimmy Coleman's credibility. At the April 4, 1983 evidentiary hearing, Coleman asserted his Fifth Amendment privilege against self-incrimination, as neither the trial court nor the Lehigh County District Attorney had granted Coleman immunity from prosecution as to his testimony at Petitioner's trial. On or about May 5, 1983, the Lehigh County District Attorney allegedly granted Coleman immunity from prosecution for purgery as to his trial testimony, and Coleman provided the statement recanting his March 17, 1980 recantation.

Petitioner alleged in his civil rights complaint that some of the Respondents conspired to frame and or set up the Petitioner for the charge of solicitation for murder, entrapped the Petitioner into a crime for which he was charged, and concocted the encouraged purgery by various Commonwealth witnesses at Petitioner's criminal trial. Bernstein further alleges that the Respondents deprived him of his Constitutional right against unlawful and unreasonable search of his residence, of his Constitutional right of not having to answer to a capital or otherwise infamous crime without a bill of particulars, and of his due process of law. Specifically, Bernstein alleged that the Respondents conspired to frame him, utilize the purgered testimony, intimidated his witnesses, and denied Coleman immunity as to the March 17, 1980 recantation which prohibited Coleman from testifying at the evidentiary hearing.

Specifically with respect to the Respondent County of Lehigh, other than the general conclusory allegations of policy and custom of failing to control and or discipline the individual Respondents within its employ (none of the named Defendants in fact being within the employ of the County of Lehigh), the only other allegation is that Lehigh County employs William Platt as its District Attorney.

B. PROCEDURAL BACKGROUND. On September 27, 1983, the District Court granted a motion for summary judgment filed on behalf of the County of Lehigh and judgment was entered in favor of the County of Lehigh and against Bernstein on the ground that the Affidavit of David K. Bausch, County Executive, had not been controverted by Bernstein.

County of Lehigh had no involvement in the proceeding before the District Court following the September 27, 1983 Order. However, an Order was entered on February 8, 1985 wherein the District Court granted the motions for summary judgment of the remaining Defendants. The County of Lehigh was nowhere mentioned in that February 8, 1985 Order and Memorandum Opinion. Bernstein then filed a motion for reconsideration of the February 8, 1985 Order, which motion was denied by Order entered May 13, 1985. Bernstein then filed an Appeal of the May 13, 1985 denial of the motion for reconsideration of the February 8, 1985 Order. Neither the motion for reconsideration nor the appeal to the United States Court of Appeals for the Third Circuit mentioned the September 27, 1983 Order granting the motion for summary judgment in favor of the County of Lehigh.

Petitioner did not at any time appeal the September 27, 1983 Order of the District Court, and had for the first time contested the motion for summary judgment granted in favor of the County of Lehigh in the within Petition for a Writ of Certiorari.

II. REASON FOR DENYING THE WRIT

A. A motion for summary judgment in favor of the County of Lehigh was granted by Order of the District Court on September 27, 1983, on the ground that the Affidavit of David K. Bausch, County Executive had not been controverted by the Petitioner. Appendix at A-4. The action thereafter continued as to six (6) other named Defendants until on February 8, 1985, the District Court entered an Order and Opinion dismissing the action against them based upon the Bar of Statute of Limitations. Appendix at A-7. A motion to reconsider was filed by Bernstein on February 19, 1985, which was denied on May 3, 1985. Appendix at A-17.

The County of Lehigh was not served with any documents in the matter from the time of judgment in its favor on September 27, 1983 until the Court entered its Order on February 8, 1985. 28 U.S.C. §2107 provides that:

> "No appeal shall bring any Judgment Order or Decree in an action, suit or proceeding of a civil nature before a Court of Appeals for review unless notice of appeal is filed, within thirty (30) days after the entry of such Judgment, Order or Decree."

In Elfman Motors Inc. vs. Chrysler Corporation, 567 F.2d 1252(3d Cir. 1977), what the Court stated in its per curiam opinion concerning lack of jurisdiction applies herein:

> "we observe that the judgment in favor of Financial and Credit, which Elfman now seeks to bring up for review on this appeal, is nowhere referred to, directly or indirectly, in the notice of appeal. That judgment was not a step in the procedural progression leading to the final judgment in the case, which was entered in favor of Chrysler. On the contrary, it involved the financial determination of Elfman's claim against two other parties, Financial and Credit, who thereupon dropped out of the case and were in no way involved in the final judgment entered on August 9, 1977 in favor of the last remaining defendant, Chrysler. Moreover, Financial and Credit were not even listed as defendants in the case in the notice of appeal, and copies of that notice, which were served by counsel for the appellant on the other defendants, were not served on them. Under these circumstances, it is impossible to construe the notice of appeal as inartificially or inferentially including the summary judgment entered on September 20, 1976 in favor of Financial and Credit.

> But this we would have to do to acquire jurisdiction to review that order. We are led inescapably to the conclusion that the appellant at the time it filed its notice of appeal did not intend to seek review of the summary judgment which it now, out of time, seeks to have us review."

In the within matter, the Third Circuit Court of Appeals had no jurisdiction to review the September 29, 1983 Order of the District Court since no appeal was taken of that Order. Likewise, as the Third Circuit Court of Appeal lacked jurisdiction, and did not, in fact, address the granting of the motion for summary judgment in favor of the County, this Court also lacks jurisdiction to address that issue.

Petitioner's memorandum in footnote sixteen (16) states that Lehigh County's motion for summary judgment was based upon a Solicitor's Affidavit on information and belief. This is an absolute fabrication. The Affidavit was prepared and signed by David K. Bausch, The Elected County Executive of Lehigh County. If Petitioner was desirous of contesting the granting of the motion for summary judgment in favor of the County, then this issue should have been raised before the Third Circuit Court of Appeals, and cannot now be raised before this Court for the first time.

III. CONCLUSIONS

For the reason set forth above, Respondent, County of Lehigh respectfully requests that the Petition of Sanford Bernstein be denied, and that this court not issue a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Certificate of Service

PATRICK J. REILLY, ESQUIRE, Assistant County Solicitor of the County of Lehigh, certifies that on this date he served copies of the Appellee's Brief filed herein upon all counsel of record by First Class Mail addressed as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES

SANFORD BERNSTEIN,
Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA, JAMES MC CARTHY, COUNTY OF LEHIGH, WILLIAM PLATT, ANTHONY PADRONE, WULF HEUSINGER, THOMAS MURTAUGH, DONALD LAYTON, DALE YEAGER, MICHAEL ALVIN, JIMMY H. COLEMAN, NANCY B. BERNSTEIN, CATASAUQUA POLICE DEPARTMENT, ALLENTOWN POLICE DEPARTMENT, WOODROW KEISER,
Respondents

85-1691

CERTIFICATION

PATRICK J. REILLY, ESQUIRE, certifies that he is a member in good standing of the Bar of the United States Supreme Court.

Patrick J. Reilly
PATRICK J. REILLY, ESQUIRE

Dated: 7/2/86